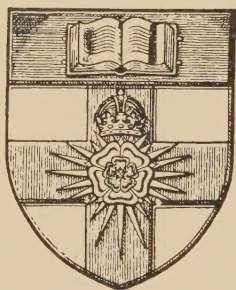


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THE
LAW REPORTS.

English and Irish Appeal Cases

AND

Claims of Peerage

BEFORE

THE HOUSE OF LORDS.

REPORTED BY CHARLES CLARK, BARRISTER-AT-LAW,
BY APPOINTMENT OF THE HOUSE OF LORDS.

VOL. V.

DURING THE SESSIONS OF 1871-72.
XXXIV & XXXV TO XXXV & XXXVI VICTORIÆ.

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ERRATA.

- Page 33, foot-note(3), for "Law Rep. 3 H. L. 347," read "Law Rep. 2 H. L. 347."
,, 261, last line but one. Mr. *Ferrers* is erroneously described with Messrs.
C. *Andrews*, Q.C., and A. S. *Jackson*, Q.C., as "of the Irish Bar."
This description applies to those gentlemen alone, Mr. *Ferrers* being
a member of the English Bar.
,, 321, line 10 of head-note, for "his" read "the vendee's."
,, 332, in reference for *Cothay v. Sydenham* for "Law Rep. 5 Ch. Ap. 277,"
read "2 Br. Ch. Cas. 391-3."

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Appeal Cases

BEFORE

THE HOUSE OF LORDS.

ENGLISH AND IRISH APPEALS.

JAMES NEILSON, W. M. TENNENT, J. MAR- } APPELLANTS;
SHALL, AND D. H. YOUNG }

AND

WILLIAM BETTS RESPONDENT.

1870
Feb. 16, 17, 20,
21, 23, 24.
1871
March 6.

Patent—Foreign-made Article—User in England—Specification—Practice—Costs.

B. held an English patent for the manufacture of a combined metal, to be (among other purposes) applied as capsules to put on bottles. *T.* (who resided and carried on the business of a brewer in *Scotland*) purchased capsules, made according to the process described in *B.*'s patent, from a foreign manufacturer, and, in *Scotland*, put these capsules upon his beer bottles, which he then sent to his agents in *England* for transhipment and exportation. There was no evidence that the beer was sold in *England* for consumption here:—

Held, that though the capsules were put on in *Scotland*, their user while the beer remained here was a continued user of them which amounted to an infringement of the patent.

In ordinary cases the duty of establishing that the thing patented has been pirated lies on the patentee, and Courts of Equity grant limited orders of inspection for the purpose of enabling him to discharge that duty. Such orders cannot be granted where the piracy alleged has taken place abroad:—

Semble, that then it becomes the duty of the Defendant to give evidence of a negative character to prove (in answer to the *primâ facie* case made by the patentee) that the process used was of a different character from that which had been patented.

Where that negative evidence was not given by the Defendant, but positive evidence on the part of the patentee was given by one workman that he

7th 576
3rd D. 576
507
6th D. 423
12th D. 151
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17th D. 72
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had been employed at the foreign manufactory, and there saw the capsules manufactured by a process not distinguishable from that of the patentee:—

Held, that these circumstances justified the conclusion of identity of material and process, and were sufficient warrant for the grant of an injunction.

Where a patent had been taken out by *D.* in 1804, and another patent had been taken out by *B.* in 1849, and *B.* took proceedings against *N.* for infringement, to which *N.* set up as an answer want of novelty, and proved *D.*'s patent, evidence of all that was done in the trade to which the patent related between the date of *D.*'s patent and of *B.*'s patent, was admissible on this question of novelty.

Per LORD COLONSAY:—It is not enough that there has been in a former patent a general disclosure of the object to be attained, unless there is a specification clearly pointing out the mode of attaining it.

After a patent has stood inquiry and the test of time, Courts do not encourage verbal objections to the form of the specification.

If a claim to the production of a material can be substantiated, the description of a particular use to which it can be applied, which may be comprehended in the general description of its uses, but is also specially set forth in the specification, will not constitute an objection to the validity of the patent.

A patent having been sustained, the decree granted an injunction against farther infringement, directed an inquiry as to damages, and an account of profits. The decree was varied by striking out the order for the account of profits.

But in this case the variation of the decree was *held* not to affect the patentee's right to costs.

THIS was an appeal against a decree of Vice-Chancellor *Wood*, which had been affirmed on appeal by Lord Chancellor *Chelmsford* (1).

In 1849 the Respondent obtained a patent for "a new manufacture of capsules, and of a material to be employed therein, and for other purposes." The material parts of the specification (which is set forth fully in 8 El. & Bl. 923, and 10 H. L. C. 117²) stated that it "consists in combining lead with tin by covering the lead with tin over one or both surfaces of the lead, and reducing the two metals in their conjoined state into thin sheets, of a thickness suitable for the purposes to which they are to be applied. And for the purpose of so preparing lead by covering the same with tin as aforesaid, I first cast the molten lead in an ingot mould of cast iron (or other suitable material), and constructed in the usual manner of ingot moulds for metal, and of suitable internal

(2) See also *9 Jur. Rep.* 29. *4 Jur. Rep.* 478, 479.

(1) *Law Rep.* 3 Ch. App. 49.

See *Bethel v. White* 162 H.L. 319. 324-5; 7

dimensions for producing ingots of lead, which (for the manufacture of the material for capsules), may be between four and five inches wide, by about three-quarters of an inch thick, and about thirty inches in length, with a few inches at one end of each ingot, gradually reduced in thickness in the manner of a wedge. I also cast tin, either into similar ingots of the same or nearly the same description as the aforesaid ingots of lead; or the tin may be cast into long thin strips of nearly the same width as the aforesaid ingots of lead, and between one quarter and one-sixteenth of an inch in thickness, and several feet in length. And having thus obtained the lead and the tin in suitable states for beginning the rolling or laminating each of the two metals separately between a pair or pairs of revolving cylindrical flattening rollers, of the construction usually employed for rolling or laminating ductile metals, I pass and repass the lead one or more time or times through or between such rollers, that is to say, rolling and re-rolling the ingot of lead as many times as may be requisite for reducing the lead to about one-fourth of an inch in thickness, and thereby the ingot of lead will become greatly elongated. And in like manner I roll and re-roll the tin as many times as (according to its original thickness when cast as aforesaid) may be requisite for reducing it to about one-twentieth part of the thickness to which the lead is reduced by rolling as aforesaid, whatever that thickness may be. The lead and the tin having been thus reduced to their proper relative thicknesses, and their widths being nearly alike, and even surfaces of each of the two metals having been obtained by the aforesaid rolling, then, in case it is intended to cover both sides of the lead with tin, I extend a long strip of the thin tin (so reduced to relative thickness as aforesaid) flatways upon a smooth table, and lay a shorter strip of the lead (so reduced to relative thickness as aforesaid) very evenly upon the extended tin, with one end of the said strip of lead conforming with one end of the said long strip of tin, and then I fold back the tin over the other end of the lead (being that end thereof which still retains some of that wedge-like form of the original casting of the ingot of lead already mentioned), and consequently the tin when so folded will apply to both surfaces of the lead; I then cut off the long strip of folded tin to correspond with the length of the lead, and I smooth down

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the tin with any convenient wooden rubber, or otherwise, so as to take out all wrinkles in the tin, and bring it very evenly into superficial contact with the lead, and with the two bordered edges of the strip of tin conforming everywhere with the two border edges of the lead, so as to ensure that the tin shall cover the lead as completely as can be done. I then take up the lead and tin together from off the said table, and present the folded end of the tin to a pair of revolving flattening rollers, which are set so as to subject the two metals to a very considerable pressure, and that pressure, at the same time that it reduces the thickness and elongates the two metals, will also cause their surfaces to adhere together, and then I repass the conjoined metal again and again between the said rollers for farther reduction and elongation, and at every succeeding time of so repassing, the adhesion of the two metals will become more complete, and when the strip of conjoined metals is thus become elongated to a considerable length, I find it is convenient for farther repetitions of the rolling to gather up the said strip (as fast as it comes out from between the said pair of flattening rollers) into a spiral coil." The specification went on to describe how the combined metal thus prepared was again to be rolled as often "as may be requisite for reducing the said strip of conjoined metals to the required thickness. For the manufacture of capsules the material so prepared is cut into discs of pieces of the required size." It then stated that the material might be applied to several other purposes, the means and objects of which it fully detailed, besides that of making capsules, and went on thus: "I am aware that it has been proposed to cover lead with tin by applying the tin, when in a state of fusion, to the lead when adequately heated, so that the adhesion of the two metals would be produced by the agency of heat with the complete fusion of the tin; but the adhesion of the two metals in my new material is produced by the agency of mechanical pressure. And I wish it to be understood that I do not claim the exclusive use of the several processes hereinbefore described or referred to of casting, cutting, and rolling, except when the same are employed for the purposes of my said invention. And I hereby declare that I claim, firstly, the manufacture of the new material, lead combined with tin, on one or both of its surfaces, by rolling or other mechanical

pressure, as herein described; secondly, the manufacture of capsules of the new material of lead and tin combined by mechanical pressure, as herein described."

In 1804 a patent had been granted to *Dobbs* for "A new article of trade which I denominate *Albion* metal, and which I apply to the making of cisterns, linings for cisterns, coverings and gutters for buildings, boilers, vats, coffin furniture, worms for distillers, and such other things as require to be made of a flexible, a wholesome, or a cheap metallic substance."

Dobbs' specification was in these terms: "My said invention consists in plating, coating, or uniting lead with tin, and also the various alloys or mixtures as the case may require, which, when done, I denominate *Albion* metal, and which I apply to the manufacturing of cisterns," &c. (repeating the words in the title). It went on thus: "The operation of coating or plating lead with tin, or coating or plating alloyed lead with tin, or with alloyed tin, to make *Albion* metal, I perform by various methods, as hereafter described; that is to say, I take a plate or ingot of lead, or alloyed lead, and a plate of tin, or alloyed tin, of equal or unequal thicknesses, and laying them together, their surfaces being clean, pass them between the rolls of a flattening or rolling mill with what is technically called a hard pinch, so as to make the metals cohere. If after the first passage of the plates or pieces of metal between the rollers the plates or pieces do not sufficiently cohere, I pass them a second or third time or more between the rollers until a sufficient degree of cohesion is produced.

"N.B.—It will be useful, if not necessary, to have the rollers and the metals hot when the cohesion of the metals is to be effected by their passage between the rollers, especially when the alloyed pieces of plates are used. When lead or alloyed lead is required to be coated or plated on both sides with tin or alloyed tin, I apply a plate of tin or alloyed tin on each side the plate or piece of lead or alloyed lead, and pass them between the rollers of a mill under the circumstances aforementioned; or the same may be effected by taking a plate which is already coated or covered on one side with tin or alloyed tin, which I double with the lead side inwards, and pass it through the rollers as before described, to obtain the proper degree of cohesion. I also make

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Albion metal by the following method:—I cast a plate or ingot of lead, or alloyed lead, and as soon as it is set or congealed I cast tin or alloyed tin upon it, or under, or on all sides of it, which will cohere with the piece of metal first cast, and the *Albion* metal thus prepared may be wrought or flatted by the usual means of rolling, hammering, or pressing.”

This patent of *Betts* had frequently been the subject of litigation (1), and its validity, as against the asserted priority of *Dobbs’* patent, was the subject of a decision of this House in 1862 (2).

James Neilson and *James Marshall* were the managers of the business of *J. & R. Tennent*, of the *Wall Park Brewery* in *Glasgow*. *W. M. Tennent* was the *Liverpool*, and *D. H. Young* the *London* agent of the brewery. *J. & R. Tennent* largely exported (under purchase orders) their beer, and, for purposes of convenience in shipping to foreign parts, sent a great deal of it to *Liverpool* and to *London*. It was alleged that when sent from *Glasgow* it was from the moment of delivery on shipboard, or at the railway at *Glasgow*, treated as the property, and was held at the risk, of the purchasers; but where the beer was sent to *Liverpool* or *London*, the charges for putting it on board by lighters or otherwise were paid by Messrs *Tennent*, who always claimed to receive the excise drawbacks on exportation. They never made beer for consumption in *England*. Some few years ago Messrs. *Tennent* began to put upon their bottles of beer, intended for exportation, metallic capsules. At first they purchased these capsules from *Betts*, but afterwards obtained supplies of them from *Edward Steinkoff* of *Glasgow*, who was agent there for a foreign manufacturer of capsules. It was alleged that this foreign house (which was said to be established near *Nuremberg*, in *Bavaria*) manufactured the capsules according to the plan described in *Betts’* patent. That, however, was not admitted on the other side, but evidence was given to support the allegation. In 1865 *Betts* took proceedings against Messrs. *Tennent* for an infringement of his patent by using the foreign-made capsules, and sending to *England* the beer bottles closed with such capsules. The defence was, that the invention

(1) *Betts v. Menzies*, 8 El. & Bl. 923; 289, and Ibid. 537; 1 Moo. P. C. 1 El. & El. 990, 1020; 34 L. J. (Ch.) (N.S.) 49.

(2) *Betts v. Menzies*, 10 H. L. C. 117. *9 June 1862*

*115 C 4 June 1865, 477, 5 June 1865, 1164, 6 June 1865, 1290
9 June 1867 in Chancery, 3 June 1867, 357*

was not new, that it was insufficiently described, and that there had not been, in what was done by Messrs. *Tennent* and their agents, any infringement of *Betts'* patent. The case was heard in March, 1867, before Vice-Chancellor *Wood*, who made a decree for an injunction to restrain the Defendants in the cause from using within the district over which *Betts'* patent extended (1) any capsules made of a material similar to, or only colorably differing from, the material or combination of lead and tin discovered or invented by *Betts*, &c., and the decree farther directed an account of profits, and an inquiry whether any and what damages had been sustained by *Betts* by reason of the said infringement. ~~/s/~~ The Appellants appealed against this decree to Lord Chancellor *Chelmsford*, by whom, on the 8th of February, 1868, it was affirmed (2). The present appeal was then brought.

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Sir *R. Palmer*, Q.C., and Mr. *T. Aston* (Mr. *Wickens* was with them), for the Appellants, contended that the process claimed by the Respondent as his invention was not a new invention at the time the letters patent were granted, but had been anticipated by *Dobbs'* patent in 1804, and the mixed metal had been manufactured for trade purposes between 1820 and 1835: that even if the invention was new, it was ill described, and the specification appeared to claim more than was new: that there had not been any unlawful user of the Respondent's invention by the Appellants within the district over which the letters patent granted to the Respondent, extended—and that the orders of the Court below ought not to have been made, or ought not to have been made in the form in which they had been made. The following cases and authorities were referred to: *Hindmarch* on Patents (3); *Galloway's Patent* (4); *Chanter v. Dewhurst* (5); *Higgs v. Goodwin* (6); *Holmes v. North Western Railway Company* (7); *Caldwell v. Van Vliissingen* (8); *Kay v. Marshall* (9); *Stevens v. Keating* (10); *Foxwell*

(1) *England, Wales, and Berwick-upon-Tweed.*

(2) *Law Rep.* 3 Ch. Ap. 429.

(3) *Pages* 192, 254, 295, 492.

(4) 1 *Webst.* 724.

(5) 12 *Mee. & W.* 823.

(6) 27 L. J. (Q.B.) 421; *El. Bl. & El.* 529. *5 Jan. 1857. H.*

(7) 1 *Macro. Pat. Cas.* 22.

(8) 9 *Hare*, 415; 21 L. J. (Ch.) 97.

(9) 8 *Cl. & F.* 245.

(10) 2 *Ex.* 772.

(a) See HN (1867) 108.

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v. *Bostock* (1); *Seed v. Higgins* (2); *Curtis v. Platt* (3); *The King v. Wheeler* (4); *Minter v. Williams* (5); *Palmer v. Wagstaff* (6).

Mr. *Willcock*, Q.C., and Mr. *Grove*, Q.C. (Mr. *F. W. E. S. Everitt* was with them), for the Respondent, insisted that the evidence shewed both novelty and usefulness; that *Dobbs'* patent did not disclose the means of working out his purposes, and nothing had, in fact, been done under it; that the foreign capsules were shewn to have been made according to *Betts'* specification, and their use in this country was an infringement of his patent; and, lastly, that the orders of the Court below were right in substance and in form.

The authorities cited on the other side were commented on, and the following were cited in addition: *Walton v. Lavater* (7); *Wright v. Hitchcock* (8); *Elmslie v. Boursier* (9); *Hindmarch on Patents* (10); *Hill v. Evans* (11); *Muntz v. Foster* (12); *Stead v. Anderson* (13); *Huddart v. Govinshaw* (14).

Mr. *T. Aston*, replied.

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LORD WESTBURY:—

My Lords, I have the duty of addressing your Lordships in the first instance at the request of my noble and learned friend the Lord Chancellor, and my noble and learned friend on my right, who heard the case in the Courts below:—[Having expressed his great regret at the repeated litigations which had occurred with regard to this patent, His Lordship said:—]

But there is in this appeal a farther and peculiar subject of dissatisfaction. The patent finally expired on the 13th of January, 1868. On the 8th of the following February the judgment of the

- (1) 10 L. T. (N.S.) 148.
- (2) 8 H. L. C. 550.
- (3) Law Rep. 1 H. L. 337.
- (4) 2 B. & Ald. 345.
- (5) 4 Ad. & E. 251; 1 Web. Pat. Cas. 135.
- (6) 23 L. J. (Ex.) 217; 9 Ex. 494.
- (7) 8 C. B. (N.S.) 162; 29 L. J.

- (C.P.) 275.
- (8) Law Rep. 5 Ex. 37.
- (9) Ibid. 9 Eq. 217.
- (10) Page 491.
- (11) 4 De G. F. & J. 288.
- (12) 2 Webs. 92; 8 Jur. 206.
- (13) 4 C. B. 806.
- (14) 1 Webst. Pat. Cas. 85.

(6) 10 L. J. 581

Lord Chancellor was given. By the expiry of the patent the injunction fell to the ground. There remained, therefore, in substance, only the infinitesimal subject of demand in the shape of damages for the user of the patent in *England*; but there remained also the enormous subject of the costs of the litigation which had taken place. Now undoubtedly it is a very wholesome rule that a Court of Appeal shall not be occupied with the question of costs where those costs are merely incidental to the decree or judgment which has been pronounced. If the costs are governed by any peculiar rule and made a separate subject of relief, they may well be made a subject of appeal. That, however, is not the case in the present instance. We have, therefore, been occupied for several days really and substantially with that which ought not to be the subject of inquiry by a Court of Appeal, namely, who is to pay the costs of the litigation.

My Lords, the patent in question was granted in the year 1849. Several objections have been taken from time to time to its validity. It is insisted upon by the Appellants on the present occasion that there has been no infringement of the patent, and farther, that the patent itself is invalid.

Now I will take the subject of the alleged absence of infringement first. The patent, be it observed, does not extend beyond "*England, Wales, and the town of Berwick-upon-Tweed*;" it does not extend to *Scotland*. The principal user of that which is alleged to be the pirated article has, in fact, been in *Scotland*. It is, however, contended by the Respondent that there has been a user of his invention in *England*, and that that user was of an invention which infringed the original patent. It will therefore be necessary to shew that the thing used by the Appellants in *England* was an infringement of the patent, and that there has been an actual user of that thing constituting the infringement within the dominion of the patent, that is, in *England*.

Now the question of user was argued at some length, but I think unnecessarily; for there is, in fact, not only proof, but admission by the Appellants themselves, that they have to a limited extent used the patent in *England*, though they contend, it is true, that what they have done does not amount to a user of the patent. The facts are, that they appear, for two or three years, to have bought their

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capsules from the present Respondent; they then resorted to another quarter for a supply of capsules. Being manufacturers and great traders in *Glasgow*, they bought from a gentleman of the name of *Steinkoff*, who appears to be resident in *Glasgow*, a quantity of capsules, which they have used since they ceased to be supplied by the Respondent. It is admitted that this Mr. *Steinkoff* obtained the capsules with which he supplied the Appellants from a place near *Nuremberg*, in *Bavaria*. And the user which is admitted to have been made by the Appellants of these foreign capsules is this, that after having applied them to their bottles of beer, they have, in some cases, sent the bottles of beer so capsuled to their agents in *England* for exportation from *England*. They contend that, generally speaking, they have sold the capsuled bottles to persons in *Glasgow*, and that these bottles became the property of those persons from the time of their being either put on board ship or placed on railways at *Glasgow*; and that, consequently, the user thenceforth was a user by the owners of the bottles, and not by them, the Appellants. But notwithstanding that, even if it be well founded, the fact is, that they admit, both in their answer and in their present case, that in some instances they have sent the capsuled bottles into *England* on their own account for the purpose of exportation from *England*; and therefore, whilst the bottles travelled through *England*, as soon as they passed the border there was an user of the capsules by the Appellants, and the capsule was performing its proper function during the whole time of the transit of the bottles through *England* and their remaining in *England* until they were exported. That amounts, it is true, to an evanescent or infinitesimal matter; but still it is, to a certain extent, an injury to the Respondent, and it is probably a reason which prevented the Respondent from selling as large a number of capsules as he would have done but for this user by the Appellants.

I am, therefore, my Lords, obliged to submit to your Lordships that there is here evidence of a user of the patented article prejudicial to the Respondent, the patentee, which is sufficient in itself to justify and support the injunction, and the direction as to damages, and that it is not necessary to enter into the inquiry as to the extent to which this has been done, it being clearly proved,

and in fact admitted, that it has been done to a certain extent, and in a manner that must have been injurious to the patentee.

But this, of course, is not sufficient without shewing that the foreign capsule so used and so transported to *England* by the Appellants was formed of a material that was in itself an infringement of the patent. Now, it seems to be quite clear from the evidence, that the material of which the foreign capsules were composed was in itself identical, in the result of the manufacture, with the material patented by the Respondent. The Respondent's patent, I think it was agreed on both sides of the Bar, was a patent for a certain material produced by a defined process, which is described at considerable length in the Respondent's specification, and it seems clear that there was no distinction in the mode of application and use made by the Appellants, between the capsules which they were in the habit of buying from the Respondent and the capsules which they received from the foreign manufacturer. It is said, indeed, that upon an analysis of the material used in the foreign capsules the proportions of the constituent ingredients do not appear to be precisely the same with the proportions mentioned in the Respondent's patent. That will be more fully considered when we come to the objections which have been raised to the validity of the patent on the ground of the want of novelty. But in the absence of that definite proof which might have been afforded by the Appellants on this subject, the evidence that we have proves sufficiently identity of material, and not only identity of material, but also the other requisite that must be supplied, namely, a sufficient ground for concluding that a material substantially identical was also produced by a process substantially the same as the patented process of the Respondent.

In all these cases the evidence required must be determined by the nature of the subject matter, and also by the opportunity possessed by the person on whom would be thrown in the first place the *onus probandi*. In ordinary cases of pirated patents in *England*, Courts of Equity have been in the habit, where there is a difficulty in obtaining proof, of granting a limited order of access and inspection of the machinery possessed, or the manufacture carried on, by the individual who is charged with the piracy. The opportunity of doing that, of course, is not enjoyed by the Respon-

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dent here by reason of the locality of the foreign manufacture. But the opportunity of describing the actual process pursued there was, no doubt, possessed by the Appellants to the full extent, and the Appellants, therefore, might entirely have rebutted the *primâ facie* evidence given by the Respondent, if it was in their power to do so, by producing conclusive proof that the process of the foreign manufacture was substantially different from the process described in the Respondent's patent. That, however, they have not done, nor have they assigned any satisfactory reason for not having done so. On the other hand, the Respondent has produced proof by a workman who says not only that he was employed in that foreign manufactory, but that he actually saw the capsules made there by a process not distinguishable from the patented process, and which capsules were marked with the trade mark of the present Appellants. I have no difficulty, therefore, in accepting altogether upon this point the conclusion which was arrived at in their most able and laborious judgments both by the Lord Chancellor and the Vice-Chancellor in the Court below, that there was here identity of material produced by a substantially similar process to that of the Respondent, and that therefore there was proof of the user of a pirated article by the Appellants in *England* sufficiently profitable to the Appellants and detrimental to the Respondent to be made the foundation of an injunction and an inquiry as to consequential damage.

My Lords, we come in the next place to the other objection which has been raised to the validity of the patent, and I think it cannot be expected that we should go in detail through that which has been investigated, sifted, and weighed in the most exhaustive, and, to my mind, most satisfactory manner, in the judgments of the learned Judges in the Courts below. The objections that have been taken to this patent are two. It is said that the patent is void for want of novelty. It is said, also, that the specification is bad. I think I shall state accurately the objections which have been taken to its validity, when I state that the first objection is founded wholly upon want of novelty, and that the other objections were founded upon this—the insufficiency of the description contained in the Respondent's patent with reference to the proportions of the ingredients employed.

The objection to the validity of the patent on the ground of want of novelty rests, first, on an old patent familiar to all of us who have been previously acquainted with these subjects of litigation, an old patent of a man of the name of *Dobbs*, which was granted in the year 1804. That patent, therefore, expired about the year 1818. It was succeeded by another patent which was granted, I think, to a nephew of *Dobbs*, for a somewhat different process. The patent of the present Respondent, as I have already said, was not granted till the year 1849.

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Now, my Lords, upon this point I think an argument was urged, in a very able speech by Mr. *Aston*, to the following effect: First, he said, if the general method or principle of uniting tin and lead be claimed by *Betts*, it is anticipated by *Dobbs*' patent; secondly, if the particular details of the process be claimed, then the description of that process is defective and void, because the definite proportions are not given; thirdly, the patent was bad by reason of the second claim, namely, the application of the material to capsules. I think that is the summary of the general grounds of objection.

Now, first, with regard to *Dobbs*' patent, the history of the antecedent decision is of this nature: The point, it seems, was reserved on the trial before Mr. Justice *Erle*, and came on to be considered as part of the grounds on which a rule for a new trial, or rather for a nonsuit, was applied for in the Court of Queen's Bench. The Judges of that Court were of opinion on the production of the two specifications that the one anticipated the other. They accordingly directed a verdict for the Defendant in the action on that ground, and they enlarged the consideration of the rest of the rule. That particular question therefore, namely, whether *Dobbs*' invention had anticipated *Betts*', having regard to the two specifications only, was carried by appeal to the Court of Exchequer Chamber, where it was confirmed. The patentee, not disheartened, as he might well have been, appealed. Your Lordships, with the aid of the rest of the Judges who had not been present in the Exchequer Chamber, came to the decision that if you took *Dobbs*' specification in the one hand, and *Betts*' specification in the other, you could not, upon a comparison of the two *per se*, arrive at the conclusion that the one anticipated the other (1).

(1) *Betts v. Menzies*, 10 H. L. C. 117.

*J. M. R. S. 27.*



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Now, my Lords, I mark this the more because I observe something of a difference of opinion, or rather a difference of expression, between the Vice-Chancellor and the Lord Chancellor with reference to what was done by this House in its judgment upon the question before it. And I will read for the purpose of expressing that difference a passage from the Lord Chancellor's judgment. He says (1): "The Vice-Chancellor seems to have thought that the House of Lords decided that *Dobbs'* specification did not disclose *Betts'* invention. But the sole ground upon which I understand the reversal of the judgment of the Exchequer Chamber to have proceeded is, that the mere production of *Dobbs'* specification, in which he makes public his idea that lead and tin might be usefully combined, and a new material produced by mechanical pressure, without any proof being given that a practical result could be attained, was insufficient to shew that *Dobbs* had published to the world any invention at all."

Now, I am inclined to agree entirely with the Lord Chancellor in that opinion, and I believe that, upon an examination of the addresses that were made to your Lordships' House by the noble and learned Lords who took part in the judgment, it will be found that all that the House decided was this, that a comparison of the two things did not in any sense prove identity, but they left it open to have two things done, one being the examination of skilled witnesses for the purpose of proving that, to a mechanic of ordinary skill, the words in *Dobbs'* specification might be intelligible, and might communicate so much information as to enable him to work *Dobbs'* specification in such a manner as to produce the same description of material that *Betts* had patented; and, secondly, they left it open for the Defendant to adduce evidence to prove that *Dobbs'* specification was capable of a practical and useful application. That is well expressed by Mr. Justice *Crompton*, in a passage which is cited by the Lord Chancellor, in which he says: "If *Dobbs'* patent disclosed a practical invention, no farther publication than his specification was necessary, and we cannot help thinking that the question of law as arising from *Dobbs'* patent alone having been withdrawn from the jury, they did not consider

(1) Page 406, Joint Appendix of the parties in this case.



what we must now take to be the real question on *Dobbs'* patent, whether the patent and specification did not disclose a real practical invention, the same in whole or in part as the Plaintiff's, and not a mere notion which could not be worked out without farther discovery and invention."

The point, therefore, has been conclusively settled by your Lordships' House, that the invention of the one taken *per se* did not forestall or anticipate the invention of the other.

I will merely note for a moment some little difficulty that appears to have been felt about an opinion I expressed in the case of *Hill v. Evans* (1), as to what it was necessary to find in the anterior publication. In that case, as in the present, we were dealing with processes. The question here is, whether the process of *Dobbs* contained within itself, *in gremio*, a sufficient description of the process of *Betts*, so that an intelligent mechanic might ascertain the one from reading the other. It was the same question in the case of *Hill v. Evans*. That also was the question of a comparison of two processes, the one in an anterior patent, the other in the patent which was sought to be established. And I see no reason at all, having regard to the subject matter with respect to which the conclusion was arrived at, for altering the language I then used in giving judgment as Lord Chancellor. And I find that language fully confirmed by the language of Lord *Lyndhurst* (2), when he was speaking of a comparison of a specification describing the machine which was the subject of the invention with a subsequent specification for the same machine. For he says this, "If a machine is published in a book, distinctly and clearly described, corresponding with the description in the specification of the patent, though it has never been actually worked, is not that an answer to the patent?" In like manner my opinion was that the antecedent process, if it be relied upon as forestalling the second, must be so clearly and distinctly described that those who read it, bringing to it competent mechanical skill, would be enabled to work it out to the same result as that arrived at by the process contained in the subsequent patent. Lord *Lyndhurst* required for the anterior description of the machine, that it should

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(1) 4 De G. F. & J. 288, 302. *8 Jur. Rep. 525.*

(2) *Househill Company v. Neilson*, Webst. Pat. Cas. 718, n.; 9 Cl. & F. 783.

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be distinctly and clearly described in a manner corresponding with the description in the specification.

Now, that being the obligation lying upon those who appeal to a prior patent as having already given to the world the necessary and useful information which is contained more fully in the subsequent patent, that being, I say, the obligation, the Appellants in the present case have sought to discharge themselves of that obligation by producing two descriptions of evidence, one, the evidence of scientific witnesses, who, taking up in the years 1866 and 1867, when they were examined, the specification of *Dobbs*, have tried to work it in such a manner as to produce results substantially identical with the material of *Betts*, and therefore to prove that, in reality, it forestalled *Betts*' discovery. The other consists of evidence not applicable to *Dobbs*' specification, but applicable to the fact of there having been in reality a prior user of *Betts*' process anterior to the patent. Now, with regard to this evidence I am inclined rather to concur with two observations of the Lord Chancellor in his judgment, which differed in some degree from the view taken by the Vice-Chancellor. The Vice-Chancellor, in his most elaborate judgment, thought that he was under an obligation to reject altogether the consideration of the scientific evidence to which I have referred, because he said: "I cannot find that *Dobbs*' patent was ever used, or ever worked, or ever applied to a useful result, and unless you can shew me that *Dobbs*' patent admitted of and received a practical application, I cannot enter into the consideration of this evidence, that it might have had such an application." I rather concur, therefore, in the observation of the Lord Chancellor, upon that, who said (1): "Such evidence" (that is, the evidence of the scientific witnesses) "the Plaintiff has produced, but the Vice-Chancellor disposes of it very summarily. His Honour in giving judgment, says: 'As to the scientific evidence, I must, with all due deference to the very eminent gentlemen who have given it, put it aside. I must look to the evidence of facts and to the evidence of what has been done.' But, with great respect, this is what the Vice-Chancellor did not do. The evidence which he discarded was hardly of the nature of scientific evidence, but as practical as that which was adduced to prove the actual

(1) Joint Appendix of the parties, 409.

user of the invention prior to *Betts'* patent. But the Vice-Chancellor considered the proof that *Dobbs'* patent could be acted upon as of no value, unless it could be shewn that it has been acted upon."

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My Lords, I am rather inclined to think that your Lordships, in your prior decision, considered it open to the Defendant in that case to adduce evidence of this description, and I certainly think that upon the inquiry whether *Dobbs'* specification, rightly interpreted, did or did not involve, as I have already said, *in gremio*, the invention of *Betts*, it was competent, even at this time of day, to apply the evidence of scientific men making experiments upon the process described in *Dobbs'* patent, for the purpose of ascertaining whether they could arrive at a conclusion at all resembling or involving the invention of *Betts*. But, my Lords, there can be no doubt at all, when we come to examine that evidence, as to the real value of the testimony adduced. I must, however, observe that I rather concur with the Lord Chancellor, in another observation upon the Vice-Chancellor's judgment, who said in substance this : It is of no value to tell me what has been subsequently discovered, unless you carry back the knowledge to the date of *Dobbs'* patent in 1804. I do not think that that is quite a correct view—it is rather too limited a view of the subject—and for the benefit therefore of the Appellants I should have been disposed to say that, upon the question of novelty, if you could add to *Dobbs'* specification farther discoveries, as for example with regard to the machine, with regard to the arrangement of the rollers, or the power of the rollers, which are described in *Dobbs'* specification, if you could add to the limited information given by that specification evidence of some subsequent discovery anterior to the time of *Betts'* patent, of course for this purpose the subsequent discovery would be legitimate matter to be received on an inquiry whether *Betts'* invention, at the date of his patent, had or had not the merit of novelty.

But now, after making these two somewhat large concessions to the advantage of the Appellants in this inquiry, I must say that when we come to examine the scientific evidence (it does not strictly deserve that name, but we will call it so to distinguish it from the other evidence), and when we come to examine the independent evidence of user, I think I never met with a case where

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I was more pained to observe the manner in which the efforts of the men who were examined had all been directed, after their minds were fully informed of *Betts'* invention, to endeavour to strain the description of *Dobbs'*, so as to include, in the application made of *Dobbs'* design and *Dobbs'* processes, something which should approximate to the invention of *Betts*; and I say that the more, because it must be matter of surprise to all who examine this case, that though these scientific men, of great knowledge and great skill and experience in matters of this kind, have, as they tell us on paper, applied themselves to experiments for the purpose of ascertaining how far *Dobbs'* process would go, and though they have succeeded in satisfying themselves that *Dobbs'* process, as applied by them, would produce things similar to and substantially identical with the material of *Betts*, yet, so far as I am aware, no one single thing the product of these experiments has ever been produced in the Court below, nor has there been any attempt, so far as I know, to give proof of their having manufactured a material which they could bring forward and compare with the material of *Betts*, that it might stand the test of examination, and proof of its identity.

Sir *Roundell Palmer* mentioned that there were a great many exhibits (whether they were identical is another question), but there were exhibits in Court of actual products of the experiments.

LORD WESTBURY:—Of course I can speak only of the measure of information given to this House by what is produced at the Bar. I remember a piece of metal being produced, but one piece only, and about that there was some dispute as to its being identified. It was said, indeed, and it is not an immaterial thing to observe, that a great number of things had been manufactured, such as teapots, coffeepots, and pepper-boxes, which of itself appeared to my mind to be conclusive proof that there was no nearer approximation to the material of *Betts*. Because we all perfectly well know that this laminated material, which is applied in the formation of capsules, would be of a consistency and character very different indeed from the consistency of the compound applied to the manufacture of teapots or coffeepots; but I am much obliged to Sir *Roundell Palmer* for calling attention to that matter. If there



have been such exhibits of the results of the experiments of these scientific men, I am very sorry that they have not been brought more particularly to our attention, in order that we might have had proved to us that which upon the evidence I have desiderated but have been unable to find, namely, proof that by the process of *Dobbs*, without anterior lamination, which belongs to *Betts*' invention, there has been produced a material substantially identical with *Betts*' material, and capable of similar application.

Now, I do not pretend to go through the whole of this testimony, because it has, as I have already observed, been sifted and analysed to my perfect satisfaction both by the Vice-Chancellor in his exhaustive judgment in the Court of first instance, and by the Lord Chancellor in his equally elaborate judgment in the Court of Appeal (1). I concur in their observations. I desire to repeat those observations as part of what I recommend your Lordships to affirm and adhere to in the decision of this case.

Then we pass on from that to the other evidence which has been given of prior user. And here, if I have collected it rightly (which is not an easy task, and therefore I shall be very happy to be corrected if I have failed to do so), the evidence relied on by the present Appellants with regard to the prior user independently of the scientific experiments now relied on, does not go later than the year 1835. Now, my Lords, what an extraordinary thing is this! The proposition on the part of the Appellants, which you are desired to accept and to act upon, is this: that this valuable discovery made, as it is alleged, by the Respondent *Betts*, and patented in 1849, was a thing familiar as a household word to all those acquainted with the matter, and that it had been perfectly well known from the date of *Dobbs*' patent, and from the working under *Dobbs*' patent actually down to the year 1835. Yet with regard to anything produced by that means anterior to 1835 there is no evidence whatever. And then we are asked to believe that this valuable discovery died and dropped out of sight altogether about the year 1835, and that no one thought it worth his while to revive it or to act upon it, although we have it in evidence that the patent which was granted to *Dobbs*' nephew for a fusion process was acted upon, and that licenses were taken out

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(1) Law Rep. 3 Ch. Ap. 429.



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under that patent for working it subsequently to the year 1835. My Lords, I think it is impossible to give credit to testimony that would prove infinitely more than can be brought within the bounds of probability. It appears also that the proof of prior user has been reduced by the present Appellant to what took place, I think, at four distinct mills. The whole of this evidence was gone through by the Vice-Chancellor and also by the Lord Chancellor. The chief agent throughout appears to have been a person of the name of *Richard Taylor*, who passed from mill to mill, and he is alleged to have spread, not only the idea of the invention, but also the mode of practically working it out. We have in those former judgments an exhaustive examination of the evidence applicable to these four mills. It would be impossible for me to detain your Lordships by a repetition of it, but the learned Judges in the Court below have made patent with great labour all the conclusions at which they have arrived, and the reasons for arriving at those conclusions, by a very patient examination of the testimony. Now, my Lords, I entirely concur with the observations made by both those learned Judges, namely, that the evidence was not to be relied on. It is evidence to be received with the greatest possible distrust and suspicion; but it is evidence which was capable of being placed beyond the reach of distrust and suspicion by appealing to proofs of the truth of what was said—proofs to be afforded by the results of an actual manufacture, in the sale of materials, in the existence of those materials now, and in proofs which might have been afforded by a great number of persons if the truth had been as they represent, that the process was known, and that the material produced by it was known, and that the material was appreciated and sold in the market for various purposes. That plain and distinct proof which might have been given, if the truth was so, is wholly wanting. And when you come to analyse the evidence that was given, although it may be true that there were certain experiments which may *per se* have produced something like an approximation to *Betts'* patent, there is no proof that the process was ever really made practical and useful, or that there was ever any public user at all of any one of the alleged manufactures which are described by the witnesses to have resulted from the use of the process, corresponding and identical with the process of *Betts*.

My Lords, that brings us to the consideration of the last two objections to this patent, which as I read them were these: If, it is said, a particular detailed process be claimed, the claim is defective and void, for the proportions of the ingredients used are not given. Now, in the first place, certain proportions are given by *Betts* in his patent, and they consist in the relative thickness of the lead and tin. The lead he takes by way of preference at a thickness of one-fourth part of an inch; the tin he takes by way of preference at a twentieth part of the thickness of the lead—that would be the eightieth part of an inch. But he assigns these relative proportions not as things which are in themselves unchangeable, but as being the best for the purpose which he desired to accomplish, and they are given rather as illustrations of the mode of user of the process than as certain definite termini which could not be exceeded or diminished either on the one side or the other. I find, therefore, no objection to the validity of the patent on this ground. Nor is it at all customary with Courts of Justice to allow objections to the wording of a patent such as these when the patent has stood for a long period of time the test of inquiry. This has been eminently the case with regard to *Betts'* patent, and I am not aware that in any one of the various ordeals through which it has passed in different Courts of Justice any Judge has ever stated an objection to the validity of the patent on the ground of the uncertainty of the proportions given, or the necessity of having more definite and certain proportions stated.

My Lords, the last objection to this patent is one of a very material character. It is this: that after having described the process and the material, and claiming the material as the result of the process, so that the material is not claimed independently of the process, nor the process independently of the product, the specification concludes with a claim of the manufacture of capsules out of the material. But the manufacture of capsules out of the material would be one purpose only to which the material could be applied, and if a claim to the material can be substantiated by the patent, the specification of a particular user of it, comprehended in the general user claimed, cannot for a moment be accepted as a ground for vitiating the patent.

My Lords, I have now gone through the principal objections

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that have been urged at your Lordships' Bar, and I repeat that I concur in the examination of the evidence made by the learned Judges in the Court below, and regret extremely that this case should form another exhibition of the absolute inability of our judicial tribunals to deal satisfactorily with inquiries of this kind. I trust that this will be one of those cases that may expedite the creation of a tribunal fitted for the determination of these matters without involving a ruinous expense to the patentee, which takes all the gilt—all the profit—off the patent, and also an oppressive expense to the other party defeated in the litigation.

My Lords, I have only farther to observe that the decree of the Court below directed not only an inquiry as to damages, but also an account of profits. The two things are hardly reconcilable, for if you take an account of profits you condone the infringement. I therefore think, my Lords, that we were right in calling upon the Respondent's Counsel to elect between the two which he would adopt. He has adopted the inquiry as to damages, and the other, the account of profits, must be struck out of the decree. But that ought not to alter the result of this appeal, and I trust, therefore, that your Lordships will concur in the motion I have to make, that this appeal should be dismissed with costs.

LORD COLONSAY:—

My Lords, my noble and learned friend who has moved the judgment of the House in this case has stated the grounds upon which he has come to this conclusion so clearly and so fully that I am unwilling to add anything to what he has said; for I concur in all the views he has put forth in regard to this case. I shall, therefore, merely mention the points to which I have mainly directed my attention, and the results at which I have arrived:— [His Lordship stated the nature of the objections raised to the patent, and said:—]

With regard to the last of these points, whether the capsules were used within the territory of *England* and *Wales*, if we confine our attention to that part of the case which has reference to the exportation, for their own behoof, by the Appellants, I do not see how it is possible to avoid the conclusion that they were used within the territory for which the patent was granted. No doubt

the capsules were made elsewhere; no doubt they were in the first place applied to the bottles elsewhere; but still they were used for the benefit and profit of the Defendants all the time they were passing through *England*, or lying in *England* to be shipped to other places, just as much as if the corks had been patent corks, or the bottles had been patent bottles—they were performing their use and their purpose during the whole time.

An ingenious argument was presented to us as to the use of a patented article being completed and fulfilled when it was first applied to its purpose. All that depends on the nature and character of the use made of the article. Now in this case, the use was to be a continued use; it was to protect the material, the ale and beer in the bottle, from the time it was started outwards till it reached its destination. That I think is perfectly plain. And it seems unnecessary in this case to go into the other and more difficult question, as to whether there would be an infringement of the patent in the event of the ale being exported at the risk and on account of the purchaser. I think we may discard that part of the case from our minds altogether. I do not profess to give any opinion upon it here. It might be a question, if a Bavarian merchant shipped beer, protected by such capsules, part of a general cargo, in a vessel which merely called at a port in *England*, whether while the vessel was in the English port or in the English waters, it would be an infringement of the patent. I do not go into that question at all. I limit myself on this part of the case to the proof and admission that it was beer exported for behoof and on account of the Defendants, who sent it into *England* to be retranshipped, and thereby got the benefit of the use of these capsules in *England* while the beer remained here.

Then, as to whether the capsules were proved to have been of the same construction, and made by the same process as the capsules of the patentee, Mr. *Betts*, I think the preponderance of the evidence on that point is decidedly that they were so:—[His Lordship went into a statement of the evidence which satisfied his mind on this point.]

Then questions arise as to the validity of the patent. The first question is, whether it is anticipated by the patent of *Dobbs*. That is the part of the case on which I confess I had most hesitation.

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The patent of *Dobbs* comprehended a great deal that bears some resemblance to this. The question is, whether it has so specified the process as that an ordinary skilled workman could produce the article for which *Betts*' patent was taken out. I think that has not been made out, and I think there is no evidence of *Dobbs*' patent ever being used to any great extent. No doubt this particular use of capsules was not one for which there was a demand at that time, but other articles were in demand for which *Dobbs*' process might have been used, and it appears to have been very little, if at all, used at that time.

Then as to the manufacture at the different mills, I think that was fully investigated and disposed of by the judgments of the Vice-Chancellor and the Lord Chancellor.

Then as to the specification of *Betts*: on the face of it various objections were taken, partly derived from *Dobbs*' patent, which is said to have included in a considerable degree some of the matters included in *Betts*', and partly from the generality of *Betts*' patent. I think, however, that we must in this respect give fair play to *Betts*' patent. I think it is not enough that there has been in a former patent a general disclosure of the object to be attained, unless there was a sufficient specification pointing out the mode of attaining it, and I think that *Dobbs*' patent fails in that respect. And I think that while *Betts* does not appear to have known much of *Dobbs*' specification, he has put forth in detail a mode of producing this material which has proved to be perfectly successful.

Then it is objected that *Betts*' patent does not give the particular proportions of the ingredients to be used, and that so far it does not satisfy requirements more than *Dobbs*' satisfied them; I think it does give the proportions; it gives two things that the patent of *Dobbs* does not give: it gives, in the first place, the process of lamination, and in the next place certain relative proportions of the two metals that are to be used. This patent I hold to be a patent for producing a certain material by a certain process; and though at the end it claims not only the material for use, but the manufacture of capsules from the material so produced, and produced by that process, which is really one of the uses to which this patent may be applied, that is to be regarded as merely a specifi-

cation of one of the subjects to which it is applied, and most usefully applied, and which probably the patentee anticipated as likely to be the largest use of his invention. I think we must hold this patent to be valid; and therefore I agree with my noble and learned friend that the appeal must be dismissed with costs.

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LORD CAIRNS:—

My Lords, I entirely concur in the motion which my noble and learned friend opposite has placed before your Lordships, and, concurring as I do in the result at which he has arrived, it would not be proper for me to occupy your Lordships' time by going through a detailed examination of this very lengthened case.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, there can scarcely be any terms too strong to express my great satisfaction at having had the assistance of your Lordships in the consideration of this case, your Lordships' minds being brought fresh to the whole of the arguments to which I have had so frequently to listen, and you being, perhaps therefore, more competent readily to form a clear and independent opinion. In this very case, the actual case which is now before your Lordships' House, I have here, for the third time, heard the arguments for and against the validity of the patent, and for and against the allegation of the Defendants having infringed the patent. I heard them first on the motion for an injunction; secondly, on the hearing of the cause; and now, thirdly, at your Lordships' Bar. In four other cases it has fallen to me to hear arguments upon the same subject, differing, only, of course, with reference to the infringement in each particular case; and I believe in three other cases I have also heard arguments as to the infringement. Altogether I certainly have had occasion myself not less than seven times to give an opinion upon the validity of the patent, after having upon the whole subject heard, I think, between forty and fifty arguments of learned Counsel. In this state of circumstances, and after the concurrence of opinion on the part of your Lordships with that expressed by my noble and learned friend, the

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then Lord Chancellor (Lord *Chelmsford*) in giving judgment on appeal from my decision as Vice-Chancellor, it would not become me to say more than that I feel thoroughly fortified in the conclusions at which I originally arrived, and that my opinion is, as it was before, that the patent is effectual and valid.

I will only make one single remark with reference to what has fallen from my noble and learned friend who has moved the judgment of the House, namely, that I think I was a little misunderstood, not by him, and perhaps not altogether by the then Lord Chancellor, with reference to the view I took of the judgment of your Lordships' House upon the matter of *Dobbs'* specification when the case of *Betts v. Menzies* was before you. I may, no doubt, have expressed myself erroneously in some other parts of my judgment, since it has misled the learned Judge who first sat in appeal upon the case; but I did at the very outset take occasion to say that I did not attribute to the decision of your Lordships' House more than its actual value with regard to the question of *Dobbs'* patent, for it will be found that what I stated (1) was this: "I do not desire to press the decision of the House of Lords beyond its proper force against these Defendants, or against any persons disputing Mr. *Betts'* patent. I do not take the House of Lords to have determined more than this, that the production of *Dobbs'* specification alone is not enough. I do not say that they decided that *Dobbs'* specification might not disclose enough; but they were not satisfied that that instrument could be taken to have described what Mr. *Betts* invented unless they had evidence of skilled witnesses to tell them that the reading of *Dobbs'* specification by a mechanic was sufficient." That is what I intended to express, although, no doubt, in other parts of my judgment I may have expressed myself less clearly and distinctly.

With regard to the infringement of the patent, that, of course, is a new question in each case; but after the examination which it was necessary for me to give to that question before, and after the confirmation of the view which was then taken by myself, by my learned and noble friend the then Lord Chancellor, who affirmed my decision, and after the still stronger confirmation we have both

(1) Joint Appendix of the parties, 348.

of us now received from your Lordships' acquiescence in the view we took, I think it would be improper for me to detain your Lordships by saying anything more upon that subject.

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LORD CHELMSFORD :—

My Lords, the propriety of the decree which I pronounced affirming that of my noble and learned friend on the woolsack having been sanctioned by your Lordships, and the reasons for the opinion entertained having been so fully entered into, I think it would not be becoming in me to trespass upon your Lordships' time by making any farther observations.

THE LORD CHANCELLOR :—

My Lords, the motion will be that the decree of the Vice-Chancellor be varied by striking out that portion of it which directs an account of profits, and that, subject to this alteration, the decrees, as well as the orders complained of, be affirmed, and the Appellant's petition of appeal dismissed with costs.

*Decrees appealed from varied in one respect, and,
subject thereto, the decrees and orders appealed
from affirmed ; and appeal dismissed with costs.*

Lords' Journals, 6th March, 1871.

Solicitors for the Appellants : *Paterson, Snow, & Burney.*

Solicitor for Respondent : *F. Kent.*

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March 3, 6.

F. H. HELBERT AND J. M. MONTEFIORE . APPELLANTS;
(*In re* BARNED'S BANK.)

AND

H. W. BANNER AND JOHN YOUNG . . . RESPONDENTS.

*Companies Act, 1862—Winding-up—Past Members—Calls—Liquidators’
“Estimate”—Surety.*

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Per 116

By the 38th section of the *Companies Act, 1862*, all “past members” of a company which is being wound-up are liable to contribute to the debts and liabilities of the company, subject to the conditions imposed by three subsections of that section: first, that the person has only ceased to be a member within the year; next, that the debts must have been contracted before he ceased to be a member; and third, that the “present members” are unable to satisfy the contributions required to discharge the debts of the company.

Making a call is within the discretion of the Court; and the call will not be made if the Court is satisfied that there are sufficient assets in the hands of the liquidators; but it will be made if there are only outstanding assets the realization of which is doubtful both as to amount and time.

The statute having taken away from the creditors of a company the right to a remedy by the ordinary process of action, the Court will not favour delay in providing the means of satisfying their claims under a winding-up.

The affidavits to satisfy the Court that a call ought to be made, need not enter into minute details to shew why the liquidators declare themselves only able to realise a certain sum, but must state reasonable grounds for that opinion of the liquidators.

Past members who deem the statements of liquidators on a winding-up to be insufficient to justify calls being made on them, must not wait till after a decision has been pronounced on those statements, and has been made the subject of appeal, but must at the time of those statements being made submit them to the process of a cross-examination.

Compromises with some of the existing members of a company under a winding-up, effected by the liquidators with the sanction of the Court, cannot operate as a release to the past members. The two classes of persons do not stand to each other in the relation of principal and surety.

THIS was an appeal against an order of the Master of the Rolls made on the 11th of July, 1868.

The Appellants were the executors of one *Lionel Helbert*. The Respondents were the official liquidators of *Barned's Banking Company, Limited*.

Charles Mozley and *Lewin Barned Mozley* had carried on at *Liverpool* the business of bankers under the style of *I. Barned*

& Co. On the 27th of July, 1865, a company, which was to purchase their banking business, was incorporated under the *Companies Act*, 1862, and received the name of *Barned's Banking Company*. The proposed capital was divided into 40,000 shares of £50 each. At the request of *I. Barned & Co.*, *Lionel Helbert* accepted transfers of 675 shares, which were registered in the books of the company, 650 of the shares on the 4th of December, 1865, and the remaining 25 on the 24th of February, 1866. These shares were, it was alleged, held by him not really for himself but in trust for *I. Barned & Co.* He died on the 10th of March, 1866, and the Appellants were his executors. Ten pounds per share had been paid on these shares, and at that date nothing was due to the company in respect of these shares.

On the 20th of March, 1866, the Appellants, who, by the regulations of the company, were, as his executors, the recognised owners of the shares, although their names were not registered as such, transferred, with the approval of the directors of the company, the 675 shares to *Charles Mozley*, and this transfer was duly entered in the books of the company, and from that date *Charles Mozley* appeared as the registered holder of the shares. In that way, it was contended, *Lionel Helbert* had ceased, on the 20th of March, 1866, to be a member of the company.

On the 27th of April, 1866, a petition was presented for winding up the company, and on the 8th of May, 1866, an order to wind it up was made.

A certificate, dated the 24th of July, declared *Charles Mozley* to be included in the list of contributories as an "existing member" in respect of these 675 shares as well as of other shares, amounting in the aggregate to 4347 shares. The list of "existing members" was distinguished as Class A. Several deeds were executed, and there was a sum of £4888 2s. 7d. belonging to *Charles Mozley* in the hands of the liquidators, which left a balance of £168,991 17s. 5d., equivalent to £38 17s. 7d. per share on the 4347 shares, as due from him.

By an order dated the 9th of February, 1867, a call of £40 per share was made on *Charles Mozley* in respect of these 4347 shares. This call was not paid, his assets being only equal to provide a small portion of it. By a certificate dated 6th of December, 1867, the

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Appellants were included in a list of "past members" of the company as "executors of *Lionel Helbert*, deceased, a member or contributory in his own right," in respect of the 675 shares. The list of past members is distinguished as "Class B."

In March, 1868, an application, founded on affidavits of the two liquidators, was made to the Master of the Rolls for a call on the Appellants, as executors, of £40 per share, or such other sum as His Lordship should think fit, on the 675 shares. Affidavits were filed on behalf of the Appellants against this application, which was heard on the 11th of July, 1868, when the Master of the Rolls ordered that a call of £35 per share should be made.

It was alleged by the liquidators that, of the liabilities of the company existing at the date of its suspension of business, the amount contracted before the 19th of March, 1866, reached the sum of £579,396 10s. 5d., that a first dividend of 3s. in the pound had been paid, that another of 1s. in the pound was about to be paid, and that after the payment of these dividends there would remain assets, consisting of cash, real estate, bills receivable, debts due, and unpaid calls, which the liquidators estimated would altogether reach the sum of £215,863. The Appellants did not admit these estimates, and they alleged that £81,073 9s. 5d. of the whole debt had been contracted before *Lionel Helbert* became a member of the company. It was also insisted that the affidavits in support of the charge were defective in not shewing clearly that proper efforts had been made to realise the other outstanding assets of the company, that the debtors had been pressed to the utmost, and that nothing else could have been done to increase the amount of the assets. The Appellants also alleged that compromises (without the Appellants having been informed thereof) had been made with various members of the company, that transfers of shares had in the same manner been improperly recognised, and that various things had been done and various things omitted to be done contrary to the intention of the 38th section of the *Companies Act* of 1862 and its sub-sections, and they therefore contended that under its various provisions the estate of *Lionel Helbert* was not liable to the call now made. They objected also to the form in which the liquidators had stated the liabilities of the company and the efforts made to reduce them, contending that it was not suf-

ficient for the liquidators to say, as they had done in several different instances, "which *we estimate* will produce," &c., but that they ought to have stated fully what were the grounds on which their estimate was founded, so that the Court might be in a position definitively to judge whether every effort had been made to get in the assets, and whether there was any ground to call on the past members to contribute. The Master of the Rolls had overruled these objections, and ordered the call of £35 per share (1).

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Mr. *Jessel*, Q.C., and Mr. *Locock Webb*, for the Appellants:—

This appeal depends on the application to this case of the provisions of the 38th section of the 25 & 26 Vict. c. 89 (2) (*The Companies Act*, 1862). There is no doubt that Mr. *Lionel Helbert* held these shares, and that they were not transferred more than a year before the winding-up of the company; so far, therefore, his estate would be liable under the 38th section. But the 2nd and 3rd sub-divisions of that section require certain things to be done before "past members" can be made contributories. Under subdivision 2 of this section there is no satisfactory evidence that the debts in respect of which *Helbert's* estate is sought to be made chargeable, were not contracted after the time at which he ceased to be a member. [They went into an examination of the liquidators' affidavits with a view to shew that the liabilities now charged upon the company had come into existence since the date of the

(1) Law Rep. 6 Eq. 509.

(2) Sect. 38. "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following:—

1. "No past member shall be liable to contribute to the assets of the com-

pany if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up.

2. "No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member.

3. "No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act."

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transfer of the shares, or that, at all events, if the accounts were fully considered, all that was due at the time of the transfer was capable of being satisfied by the assets which had been realised.] Then, again, the affidavits of the liquidators are insufficient, as they merely state that "we estimate" the amount of assets to be produced from different sources will reach only to certain sums, without shewing to the Court the grounds on which such "estimate" was founded, so as to enable the Court to determine satisfactorily whether any and what call on the past members was really required. The past members are only to be held liable if the existing members cannot satisfy the claims on the company, so that it is clear that the inability of the existing members must be distinctly made out, and ought not to be allowed as a mere matter of inference. [THE LORD CHANCELLOR referred to the case of *The Contract Corporation* (1).] The circumstances there were stronger than they are here. In *King v. The Parental Endowment Company* (2), which was upon the 1 & 2 Vict. c. 110, the Court refused to issue execution against an individual member of a company founded upon a judgment against the company, because the facts disclosed did not shew that the Plaintiff had taken really energetic steps against the company itself, since there was no affidavit of the sheriff's officer shewing what he had done, but merely affidavits of persons who stated what they believed could be done. The Court, therefore, decided on a consideration of facts alone; while here the facts are not fully disclosed, but the mere opinion of the liquidators is given. Again, in *Weston's Case* (3) it was held that a past member could not be made a contributory till two things were distinctly shewn: first, that the debt was contracted before he ceased to be a member; and secondly, that the shares formerly held by him had not been fully paid up. There, as here, the liquidator's affidavit stated his belief, but that was not deemed sufficient, the Master of the Rolls there saying: "Before I place a past member on the list I must have evidence in each individual case" as to the existence of the debt, and as to the paying up of the shares, for "both of these conditions are necessary to make him a contributory under the 38th section."

(1) Law Rep. 2 Ch. Ap. 95.

(2) 11 Ex. 443.

(3) Law Rep. 6 Eq. 17.

In the present case compromises have been entered into with some of the members. The most positive evidence that these compromises were prudent and necessary, if not unavoidable, is required. It is not enough to say that they have been entered into; they must be shewn to have been prudent and necessary. For, in truth, the past members must be looked upon as only sureties for the existing members, and cannot be held liable till the existing members have been found incapable of satisfying the claims upon the company; and it may fairly be argued that unless the compromises were unavoidable, they were wrong, and making them without the consent of the past members operates as a release of those gentlemen. *Nevill's Case* (1) shewed that where a principal was released, as here principals had been released by these compromises, the sureties could not be held liable, except on a positive reservation of the right against them (2). Nothing of the kind existed here. As was explained by Lord *Chelmsford* in *Oakes v. Turquand* (3), the late Acts merely changed the remedy, but did not alter the right of the creditor on the one hand, or the liability of the shareholder on the other. The cases which were decided on previous statutes, and which require clear and distinct proof that the shareholder was liable, must therefore be acted on here, and mere surmise and estimate are not sufficient in a case of this kind to fix liability upon the past members of the company.

Sir *R. Baggallay* Q.C., and Mr. *Kekewich*, for the Respondents, were not called on.

THE LORD CHANCELLOR (Lord *Hatherley*), having stated the case, said:—

I will, for simplicity's sake, speak of the Appellants as Mr. *Helbert*, as if he were here and not his executors. He complains that pursuant to the provisions of the statute, by which he is brought here as a person liable, certain things have to be established before he can be called upon in any way to contribute to the payment of the debts of the company. He, of course, cannot deny his original liability, having been, within a year, a share-

(1) Law Rep. 6 Ch. Ap. 43.

(2) See *Owen v. Homan*, 4 H. L. C. 997.

(3) Law Rep. 3 H. L. 347.

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holder, but he points to the special provisions in the 38th section, which regulate very distinctly the exact position of past members with reference to the company's liabilities.

Now that 38th section of the Act of 1862 says:—[His Lordship read it and the three sub-sections.]

There are, therefore, two things requisite before a past member can be made liable. First, there must have been debts contracted anterior to the time of his ceasing to be a member, for if the debts were contracted after the time when he ceased to be a member, he would not be in any respect liable; secondly, it must appear to the Court that the existing members are unable to satisfy the contributions required in pursuance of the Act.

On this appeal it has been argued that, besides these requirements, it should appear to the Court not only that the assets are not sufficient for the payment of the debts, but also that there is not any probability of assets being got in sufficient for the payment of those debts.

With reference to that part of the case, the Court, exercising a reasonable discretion, would in no case direct calls to be made if it was clear that there were assets actually in the possession of the liquidator which were sufficient for the payment of the debts. But in the other case, of assets being outstanding, you must consider what would be reasonably required by the Court. It is not pointed out specifically by the statute, but you must trust to the discretion of the Court with respect to it, and all that the Court has to be satisfied of is that there is an improbability (to say the least of it) of the assets being obtained in such a manner, and within such a reasonable time, as to be sufficient for the payment of the debts of the creditors of the company. Because the Court is not bound to allow delay for an indefinite period of time in getting in the assets. The creditors are, by the statute, restrained from proceeding to enforce their ordinary remedies, and it would therefore be neither right nor just that they should be made to wait beyond the period at which the Common Law would have afforded them their remedy, or until the expiration of every possible delay consequent on getting in the assets. They ought to be paid within a reasonable time after the commencement of the process of winding up. The Legislature has left this matter to the

discretion of the Court, not indicating anything definite upon that head, but it does require that it shall appear satisfactorily to the Court that the existing members are not able to contribute sufficient for the purpose.

That being so, it is clear that some evidence is necessary on this point. The Court is not to be satisfied unless by the ordinary means of satisfying a Court of justice, namely, by the production of evidence. The whole argument here has turned upon the question whether or not the evidence produced in this case has been sufficient to justify the order which has been made by the Court below:—[His Lordship here went into an examination of the evidence of the two liquidators, and especially referred to the following phrases:—] “The remaining assets of the company the proceeds of which will be available for division amongst the creditors thereof are these: 1. Real property at *Liverpool* which *we estimate* will produce £55,000: 2. Real property at *Manchester* which *we estimate* will produce £5000: 3. Bills receivable, being bills on hand discounted by *Barned's Banking Company*, which *we estimate* will produce £1263: 4. Amounts due from debtors to the said company, from which *we estimate* that we shall recover £31,600: 5. Calls unpaid by present members or contributories of the said company, from which *we estimate* that we shall recover a farther sum of £85,000.”

Now observe, with the existing assets and the calls on the existing members up to this time, namely, in the two years for which the liquidators had been going on, they had raised somewhere about £400,000. They then state the remaining assets, which are so utterly inadequate for the payment of what remains due that there can be no question in any one's mind of the necessity of this call, provided the affidavit taken in its form as well as in its substance is sufficient—or, rather, in its substance notwithstanding its form, the quarrel being with the form in which the affidavit is expressed, under the words, “We estimate” so and so as the amount of the assets.

Going on with their explanation they say, “If our estimates are correct (and we have used our best endeavours to make them so) the assets of the company, exclusive of sums recoverable by calls upon present members, will only pay farther dividends to the amount

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of 2s. in the pound on the liabilities of the company, and there will remain a balance of 14s. in the pound, to satisfy which would require £1,400,000."

Now, if those estimates are correct of course there can be no doubt of a case having arisen in which it was absolutely necessary to have recourse to the past members. But still there is one thing remaining to be shewn, namely, that in accordance with sub-section No. 2, of the 38th section of the Act, there were debts existing which were debts at the time when Mr. *Helbert* ceased to be a member of the company:—[His Lordship here went into an examination of the statements of the liquidators to shew that before the 20th of March, 1866, there was a debt existing which their previous statements had shewn could not be satisfied without this call on the past members.]

But then the Appellants say, in the first place, you do not tell us how you have arrived at this estimate of there being only such an amount of assets to be received; secondly, you have only told us your estimate of what is likely to be received from the other members of the company. You pledge your belief to it, and you say that, according to your duty you have fully inquired into the matter, and you are satisfied as to that fact; but you have not told us what steps you have taken—against which, if any, of the existing members you have proceeded—and why one member was not able to pay, and why another member was not able to pay—whether it was bankruptcy or insolvency, or that the member of the company had died and his estate was left in an insolvent condition, or that he had gone abroad to some distant place where you had no means of recovering against him. They say that some facts of this kind ought to have been stated, upon which the Court could have formed its own judgment as to whether or not the necessity in the particular case had arisen; and whether or not it had been made to appear upon proper evidence that the deficiency did so exist.

I apprehend, my Lords, that we should be laying down a rule which would operate very harshly upon the contributories themselves in these companies, if we were to say that these minute details were to be entered into on the part of the liquidators; and if such a decision on our part were to lead to the liquidators appending to their affidavit such a schedule of documents as is

appended by the gentleman who has made an affidavit in opposition to the affidavit of the liquidators in the present case. It is, of course, just possible that some more exact and precise phraseology might be devised than the simple word "estimate." But when Mr. *Webb* was pressed upon the subject he brought himself to this point. Seeing, as with the good sense which he possesses he, no doubt, would see, the inconvenience of having a detailed report upon all the efforts made and the steps taken for getting in the assets, he stated that he should have been satisfied if the official liquidators had said this: We have used our best endeavours in suing, as far as it was right to sue, the different members of the company who are existing members, and who are in Class A., and ought to contribute before Class B. is called upon to do so; we have brought actions, and we believe that we have recovered the utmost that we can from those who are liable to pay; we have also in other cases compromised with the sanction of the Court, the Court being satisfied that the compromises were just and proper; and we believe, as the result of all this, so and so. Mr. *Webb* would have been satisfied with this.

Now, my Lords, I must say that it appears to me that we should be setting a very bad precedent before the minds of those who are desirous of being released from the liabilities into which they have entered by becoming members of these companies, if we were to encourage them to stand by whilst the matter is in the Court below, and to abstain from putting a single question to the liquidators, who might have been cross-examined, and who, at the desire of the parties, I have no doubt whatever, would have been called on by the Court to answer questions which might have been asked on those very matters as to which the Appellants now seek to be informed. But instead of that they stand by, producing only an affidavit of their own, not pointed in any way so as to direct the attention of the liquidators to the matters which they were to answer, but throwing at them, as I may say has been done here, a whole bundle of schedules, and saying: There is a full statement of accounts, which, if you sift and analyse and examine very closely, you will find contains, not a contradiction of anything which you have said but, something which ought to lead to fuller inquiry as to what you have said. My Lords, parties cannot be

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allowed so to bring their case to this House, having held back below from that sifting examination of the case which they certainly might have had for asking; they are not to leave the whole matter in confusion, and then appeal to your Lordships' House, to the great detriment and delay of all persons concerned—contributories, shareholders, and with very serious and grievous loss to the creditors of the company. There is nothing in the affidavit on the part of the Appellant which is pointed to a contradiction of the liquidators' affidavit, nor indeed to anything which would give us a reasonable cause to doubt the fact of the liquidators having done their duty in the mode in which they say they have done it. These gentlemen having had two years of experience, and having collected from the shareholders no less than about four hundred thousand pounds, have had ample means of knowing what the state of solvency of those respective shareholders is, and how far, having made their collection of such a dividend, they will be able to extract from them by another call any larger sum of money, how many are good assets, and how much can be reckoned as likely to be recovered. They have had ample opportunities of looking into all these matters, and I have no doubt that they speak correctly when they say that they have made these estimates under a sense of duty, and a sense that they are bound to make them accurately and correctly, and that they have done so to the best of their power. There has been quite sufficient stated, for every purpose which we can require, to enable us to decide upon this appeal, brought at the instance of a gentleman who alleges himself to be aggrieved, praying us to reverse this decision on the ground of want of information, which information is *primâ facie* given, and which he had a full opportunity of obtaining in a complete form.

With regard to the point which was raised by Mr. *Jessel*, but which was not taken by Mr. *Webb*, as to whether or not there had been a release of the gentlemen in Class B. in consequence of the compromises effected with shareholders in Class A., I apprehend that no such rule as to principal and surety can be made applicable to this case. The 160th section of the Act gives full power to the liquidators in all cases with regard to contributories, as well as with regard to claims against debtors to the company, to settle them by compromise with the sanction of the Court. And it is

stated in the affidavit that all these compromises have been made with the sanction of the Court. That being so, the whole question of any release of Class B. as if liable as sureties simply for the payment of the debts, appears to me to have been put an end to by the decision of the Court.

Neither should I have thought it necessary to reserve rights which appear to have been reserved in some cases with reference to transferees' shares (1), by a clause reserving the right of recourse as to a surety. In this particular case it is not a question arising as between persons who have taken as transferees from *Helbert's* executors, but it is a question arising upon the shares of other shareholders in Class A. who stand (as the argument asserts) as principals, those in Class B. being only sureties. In such a case as that it appears to me that there is clear authority from the Court which authorizes the step which has been taken.

I may farther observe with reference to the main point, as to the sufficiency of the evidence which has been laid before the Court, that the Court is authorized by the 102nd section of the Act to make an immediate call upon all contributories, whatever their position may be, when it is once satisfied as to the insufficiency of the assets of the company. The expression is similar in effect to that which is used in section 38. By section 102 the Court in deciding upon the question of making the call may take into consideration the circumstance that the other shareholders are not likely to be able to contribute to the funds. In substance, section 102 is very much the same as section 38. Therefore, upon a consideration of the affidavits it appears to me that enough has been done here, regard being had to what has been said, and to what might have been elicited if the parties had taken the opportunity of eliciting it, to satisfy the exigencies of section 38, and that consequently this appeal must fail, and be dismissed with costs.

LORD CHELMSFORD :—

My Lords, there is no question in this case as to the liability of the executors of Mr. *Lionel Helbert* to be placed on the list of contributories. The testator had, but only within a year of the winding-up, ceased to be a member. The question which your

(1) See *Nevill's Case*, Law Rep. 6 Ch. Ap. 43.

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Lordships have to determine is this, whether the liquidators have taken sufficient steps to ascertain the amount which will be received in satisfaction of the debts of the company to justify a call being made, and whether there was sufficient evidence before the Master of the Rolls to warrant him in giving his sanction to that call.

Now it is said on the part of the Appellants that the contributories in Class B., being the past members of the company, are not to be made liable until it is shewn that the existing members are unable to contribute; and they say there was no sufficient evidence before the Master of the Rolls to warrant his coming to that conclusion. But it appears to me that the affidavit of the liquidators is amply sufficient to justify the conclusion at which His Lordship arrived. Because, in the first place, we must consider that the liquidators are officers of the Court. We must assume that they would do their duty. And, therefore, that when they made this affidavit they had taken all the steps that they considered to be necessary in order to ascertain the amount of assets which they were likely to realize in satisfaction of the debts of the company:—[His Lordship here quoted several passages from the liquidators' affidavit, the effect of which was to shew the actual necessity of making the call now in dispute.]

The counsel for the Appellants say this affidavit is unsatisfactory, because the liquidators do not tell us why it is they estimate they will recover only a certain sum, and that they do not give in detail reasons for the conclusions at which they have arrived.

My Lords, I cannot help observing that so far as we can judge from the report of what took place before the Master of the Rolls, no such objection as this was made before him. The objection taken before the Master of the Rolls, was this, that the liquidators merely said that they believed so and so, and did not shew that they had taken any steps to enforce those calls. The Master of the Rolls said, "I am satisfied that there is sufficient evidence before me to shew that if all the calls which are likely to be realised are paid, the creditors will not be paid in full." It appears to me, undoubtedly, that there was amply sufficient to warrant His Lordship in coming to that conclusion.

It is important to recollect the words of the 102nd section of the

Companies Act, 1862, which provides that calls may be made either before or after the Court shall have ascertained the sufficiency of the assets of the company. In making a call the Court will take into consideration the probability that some of the contributories may partly or wholly fail to pay their respective portions. Now it will be observed that, supposing this call is made upon sufficient grounds upon the contributories in Class B., that is, on past members, in the distribution and application of the assets, of course in the first place, the moneys which have been received from the existing members of the company must first be applied, and if it should appear that those are sufficient to satisfy the debts, the past members will then be exonerated, and they will be entitled to the return of any money they have paid. But that does not affect in the slightest degree the validity of the call; and the question being, as I have said, whether there was sufficient evidence before the Master of the Rolls to warrant His Lordship in sanctioning the call which had been made, I entertain no doubt whatever upon that subject, and therefore I am of opinion that the appeal upon that ground must fail.

I cannot altogether pass over the argument which was raised by Mr. *Jessel*, but certainly not followed by his learned junior, that there had been an absolute discharge of the contributories in Class B. by reason of the compromises which had been made with the contributories of Class A. Mr. *Jessel* argued that the contributories in Classes A. and B. stood in the relation of principal and surety to each other; and he went this length, that if there was a compromise with an individual member in Class A. without notice to the contributories in Class B. all the contributories in Class B. would be discharged from their liabilities. Now, certainly, there may be rights as between the individual contributories *inter se*, but to say that there would be this relation existing with respect to the creditors of a company seems to me, if I may venture to say so, a little extravagant.

Under the 160th section of the Act the liquidators are empowered to compromise calls, liabilities for calls and debts, with the sanction of the Court. And when the Legislature has made the past members liable to the debts of the company if the existing members are unable to pay, it can hardly be supposed that

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when the liquidators find that the existing members cannot pay the amount due from them upon their shares, after having taken from them all that they are able to pay, then the past members are *ipso facto* discharged.

My Lords, I do not think it necessary to make any farther observations on the case. It appears to me there is not the slightest ground for the argument of the Appellants, and upon the whole I agree with my noble and learned friend on the woolsack that this appeal must be dismissed with costs.

LORD WESTBURY:—

My Lords, I might very well abstain from adding anything to what has been already said; and yet I am anxious to say a few words, because the case has given me very much solicitude. Now, I concur entirely with the Appellants in demanding two things, one that the amount of the debt still remaining unpaid, and which existed at the time when the deceased member ceased to be a member, shall be ascertained and proved to the Court. The other is, that reasonable evidence shall be given to the Court that the existing assets of the company, including therein the liability of the existing shareholders, shall be exhausted before a call is made upon the past shareholders. Those two things are undoubtedly precedent conditions to the call imposed by the Act of Parliament. And there may be added to that, that there should be reasonable testimony to make it appear to the Court that these things do exist, and have been complied with. But while I cannot for a moment concede the possibility of a Court acting upon conjecture, and guess, and hypothetical conclusions, with regard to the state of the assets, or with regard to the liability of existing shareholders and the probability of more being obtained from them, I cannot for a moment approve of a shareholder who is brought before the Court folding his hands, refusing to demand specifically that which he thinks he is entitled to require, abstaining from soliciting more satisfactory testimony, and reserving his objection to that which has been done until the case comes to a Court of Appeal. I rely, therefore, upon this, that the evidence which was before the Master of the Rolls was sufficient to satisfy the statute, not only upon what is stated, I think in a very definite form, by the liquida-

tors themselves, but also upon the fact that the shareholder, who was before the Court as a contributory, abstained from desiring the Court to make more specific and more definite inquiry.

Now, my Lords, the amount of the debts is stated with reasonable certainty. The question, whether more can be got from the assets of the company, or from the existing shareholders, is left to depend on the conclusion of the official liquidators, coupled with the assurance which they give to the Court, that they have used every effort to ascertain that their conclusion is correct. Undoubtedly it would be a most lamentable thing if inquiries in a Court of Justice in matters of this kind were required to be conducted with that particularity which would involve a sort of prying into every man's affairs, into the condition of his business, and into his solvency or insolvency, which it is obvious could not be carried on. Suppose the liquidators were obliged to say: the existing shareholders are *A. B.* and *C. D.*, but with regard to shareholder *A. B.*, we find the state of his affairs to be thus; with regard to *C. D.*, we have reason to believe he is on the point of insolvency, that he has not the means of meeting his debts. Why, the man may be a tradesman carrying on business, and it would be impossible to hold, therefore, that inquiries of that description should be not only required to be made by the liquidator, but that the result of them should be made public. Now, we have this on the part of the Appellant here: he praises, and I dare say with good reason, the courtesy of the liquidators. He tells us that by the courtesy of the liquidators he has had access to their books and papers, and has been enabled to prosecute every inquiry. But he does not pretend for a moment to say that he brought before the Court proofs of the insufficiency of those conclusions of the liquidators, or that he desired that those probable conclusions of theirs should be converted into a more definite form by specific inquiries, or by any suggested course of examination brought before the attention of the Court by the person who now complains that the Court proceeded on insufficient grounds.

Now the words "it appears" must be taken in connection with the language of the 102nd section. The 102nd section distinctly refers to the Court acting when certain things are probable, when there is a probability in favour of this or of that conclusion:

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and I do not well see how business could be conducted if it were otherwise. At the same time it must undoubtedly be understood that when there is an objection made to what may be denominated merely conjectural evidence or speculative conclusion, without grounds to warrant the result in the mind of the liquidator, the Court is bound to afford to the parties requiring it the fullest opportunity of examining into the state of the affairs upon which the liquidator founds his right to make the call. I see no reason to believe that the Court would not have done that in the present instance if it had been required to do so, and I therefore think that it was made to appear to the Court in a manner satisfactory to the Act of Parliament, and in a manner justified by every reasonable mode of inquiry.

My Lords, with some reluctance, therefore, having regard to the particular case, but without any reluctance when I have regard to the conduct of the parties, I concur in the conclusion that this appeal should be dismissed with costs.

LORD COLONSAY:—

My Lords, I think it unnecessary to say more than that I concur in the judgment proposed.

LORD CAIRNS:—

My Lords, I concur also.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 6th March, 1871.

Solicitors for the Appellants: *Elmslie, Forsyth, & Sedgwick.*

Solicitors for the Respondents: *Freshfields.*

DAVID DANIEL APPELLANT;
 AND
 THE DIRECTORS, &c., OF THE METRO- }
 POLITAN RAILWAY COMPANY . . } RESPONDENTS.

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Feb. 24, 27;
 March 9.

Railway—Dangerous Works—Passengers—Precautions—Practice.

Where works are going on over a line of railway, with which works the railway company has nothing to do, and the execution of such works is entrusted to contractors who are entirely independent of the railway company, it is not the duty of the railway directors to assume that such works will be negligently conducted by those who have contracted for their execution, and to take precautions against possible negligence on the part of persons who are not in their employment nor under their control.

Per THE LORD CHANCELLOR (Lord Hatherley):—If railway directors undertake to carry passengers over their own line, and also over another line, they would be bound to see that their own was in perfect order, and would be responsible for any negligence occurring on the other line, over which they had contracted to carry passengers, whether under their control or not, but would not be responsible for matters altogether extraneous to the work in which they were engaged, unless there was reasonable ground for apprehending that extraordinary precautions were required.

Per LORD COLONSAY:—If the operation which the contractors were performing was one which, according to previous knowledge and experience, was, however carefully performed, likely to lead to mischief, it would be incumbent on the railway company to foresee and take precautions against it.

The Corporation of the City of *London* was authorized by an Act of Parliament to execute certain works over the line of the *Metropolitan Railway Company*. These works consisted partly in placing heavy iron girders upon the walls running along the line of railway, and were therefore works in the execution of which danger was involved, but which were often executed elsewhere without mischief. The railway company had no control over these works, which were executed by contractors engaged by the Corporation. Several girders had been safely put in their places by manual labour, but, on this occasion, the contractors brought into use for one of the girders a monkey steam-engine which moved the girder with a jerk, and so caused it to overbalance and fall. It fell on a passing train, and injured the Plaintiff:—

Held, that this was not a mischief the occurrence of which the railway company was bound to anticipate, and against which it was bound to take precautions, and consequently that the railway company was not liable in damages.

Where a Plaintiff has closed his evidence, and the Judge who tries the cause is of opinion that there is no case to go to the jury, he ought to direct accordingly, giving leave, if necessary, for the Plaintiff to move to enter a verdict in his favour. But it is erroneous under such circumstances to take

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a formal verdict for the Plaintiff, reserving leave to the Defendant to move to enter a verdict for him should the Judges (to whom power is reserved to draw inferences of fact) be of opinion that on the facts the verdict ought to be so entered.

THIS was an appeal under the *Common Law Procedure Act*, 1854, against a decision of the Court of Exchequer Chamber, which had reversed a judgment of the Court of Common Pleas.

The Appellant, on the 19th of December, 1866, had been a passenger by the *Metropolitan* railway train to be conveyed from the *Moorgate Street Station* to *King's Cross*, and while proceeding on his journey, at a place not above a hundred yards distant from the *Aldersgate Street Station*, was seriously injured by the fall of an iron girder. The declaration alleged that the Defendants were carriers, and then charged them in the common form with negligence. There was a second count in a similar form. The declaration was afterwards amended by the addition of a third count, which set forth that the Defendants were possessed of a certain line of railway for the conveyance of passengers for hire, upon or over which railway were being carried on, as the Defendants well knew, certain works dangerous to the lives or limbs of persons travelling or being conveyed upon the said railway, and the Defendants, while the said works so being dangerous as aforesaid were in progress, and well knowing the premises as aforesaid, invited the Plaintiff, who had no notice, and was ignorant of the said works, or of the carrying on of the same, to come upon the said railway: And thereupon, whilst the said works, so being dangerous as aforesaid, were being carried on as aforesaid, the Plaintiff, in pursuance of the said invitation of the Defendants, went upon the railway, and was received by the Defendants, and was by them put into a carriage upon the said railway to be carried as a passenger, &c: And while in the carriage he was injured by reason of the said works, &c.

The Defendants pleaded: First, not guilty; secondly, that the Plaintiff did not come as a passenger, as in the first and second counts alleged; thirdly, as to the last count, the Defendants denied that over or upon the said railway were being carried on, as they, the Defendants, well knew, certain works dangerous to the lives or limbs of persons travelling or being conveyed along

the said railway, as in that count alleged; fourthly, that they did not invite the Plaintiff as therein alleged.

Issue was taken on all these pleas.

The cause was tried before Mr. Baron *Martin* at the *Croydon* Assizes on the 16th of August, 1867. The evidence shewed that at that part of the line works were being executed by the *Thames Iron-works Company* under a contract with the Corporation of *London*, the object of which was to make a floor for the *London Meat Market*. To effect this object iron girders of great weight and strength were placed between and on the walls which formed the sides of the railway. These works were being executed under an Act of Parliament which gave the *Metropolitan Railway Company* no control whatever over them or over the men employed in executing them. The weight of the girders and the difficulty of moving them made the work dangerous; but such work had been performed in different places for years without mischief occurring (1). In some instances of the kind the railway company had placed a signalman to give notice of the approach and passing of trains. There was no such signalman on this railway, nor any arrangement made by which the work of placing the girders might be suspended on the passing of a train. It was believed that this particular girder had gone beyond its balancing line, and had so fallen over. It fell on the passing train, killed three passengers, and seriously injured the Plaintiff.

At the close of the Plaintiff's case, and on the suggestion of the learned Judge, a verdict was entered by consent for the Plaintiff, subject to leave reserved to the Defendants to set it aside and enter a verdict for the Defendants, or a nonsuit, on the ground that there was not sufficient evidence of negligence on the part of the Defendants to support the Plaintiff's case. The Court was to be at liberty to draw inferences of fact, and to adjudge upon the evidence.

A rule was obtained upon this leave reserved, and the rule was discharged (2). The Defendants appealed to the Court of Exchequer Chamber, where that decision was reversed, and a verdict

(1) The summary of the evidence given at the trial is not set forth here, as the Lord Chancellor in his judgment

quoted it fully in order to comment upon the most material parts.

(2) Law Rep. 3 C. P. 216.

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was ordered to be entered for the Defendants (1). This appeal was then brought.

The *Solicitor-General* (Sir J. D. Coleridge), and Mr. William Vernon Harcourt, Q.C. (Mr. Morgan Howard was with them), for the Appellant:—

There was no conflict upon the rules of law in the Courts below; but they differed on the application of the law to the facts. Yet it can hardly be doubted that negligence on the part of the Defendants was clearly made out. The work was in itself dangerous. Every one knew that. That fact imposed on the Defendants the duty of taking all reasonable precautions that such danger did not result in actual mischief. The law prescribed that duty, and all the more so as the passenger knew nothing of the danger, and could not by any care provide against it. Yet no such precautions were taken; there was no signalman to give notice of the approach of the trains, and to stop the work till a train had passed. Nor was anything else done to prevent a mischief from work which was well known to be dangerous. In other cases these precautions had been taken, and so mischief had been averted.

The rule of law was, that precautions should be taken in such a case. The doctrine stated by Lord Chief Justice *Eyre* in *Aston v. Heaven* (2) as to a stage-coach, that “a driver is answerable for the smallest negligence,” has been expressly adopted into the American law “as applicable to all modes of carrying passengers:” *Redfield on Railways* (3). On that principle, too, had proceeded the case of *Birkett v. Whitehaven Junction Railway Company* (4). There the Defendants’ line ended at *Maryport Station*, which belonged to another company; but for the use of it and for the use of a switch (which was self-acting) for entering the station, the Defendants paid a rent. A servant of the Defendants’ company was employed to look after some neighbouring gates, and to see that the switch acted correctly. He had not done so on this occasion, and it did not act, and the Defendants’ train ran into the trucks of another company, and a passenger was killed. On an

(1) Law Rep. 3 C. P. 591.

(2) 2 Esp. 533.

(3) 3rd Ed. vol. ii. pp. 174, 175, and notes.

(4) 28 L. J. (Ex.) 348; 4 H. & N. 730.

action by his widow, and a verdict being given for the Plaintiff, it was held that there was evidence of negligence to affect the railway company, and the verdict was sustained. That, too, was the principle on which this House proceeded in *The Mersey Docks v. Gibbs* (1). In *Dudley v. Smith* (2) Lord *Ellenborough* held that the driver of a stage-coach, before passing through any place that is dangerous, is bound to inform the passengers of the full extent of the danger, and if he does not, the proprietor is liable for any injury which they might have escaped by alighting. Now the principle there was, that the carrier was bound to take all reasonable precautions against danger; and on that principle it is clear that here the Defendants ought to have had a man to signal the moment at which a train was about to pass, and so to stop the dangerous works until it had gone by. *Redhead v. The Midland Railway Company* (3) shews that though a railway company does not warrant the actual safety of the passengers, it is bound to use every precaution to ensure that safety. That rule would make it necessary that where two companies exist and are acting independently of each other, should a mischief happen, the company carrying the passenger, though having no control over the other company, will be liable to him, because a danger existed and was known to exist, and yet every proper precaution was not taken against it (4). All these circumstances were found in this case, and the railway company ought to be held liable.

Sir *R. Palmer*, Q.C., Mr. *Hawkins*, Q.C., Mr. *C. E. Pollock*, Q.C., and Mr. *H. Lloyd*, Q.C., were for the Respondents; but the House intimated a desire to consider the matter before hearing them, and the case was therefore adjourned.

THE LORD CHANCELLOR (Lord *Hatherley*) having stated the facts of the case, said :—

The matter took a course in the Court below which is in some degree slightly embarrassing in point of form. But I think that

(1) 11 H. L. C. 686; Law Rep. 1 H. L. 93. *12 Q. B. 571*

(2) 1 Camp. 167.

(3) Law Rep. 4 Q. B. 379; 9 B. & S. 519.

(4) See *Buxton v. The North Eastern Railway Company*, Law Rep. 3 Q. B. 549; and *Thomas v. The Rhymney Railway Company*, Law Rep. 5 Q. B. 226.



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we are sufficiently in possession of the whole facts of the case to be able to come to a clear and decisive conclusion on the subject. The work was undoubtedly not under the control or management of the Defendants, but must be regarded as a work undertaken by an independent company. And even if it had been under the management of the Defendants, the work was placed properly in the hands of a contractor, who was bound to execute it in a proper and reasonable manner. I do not think, therefore, that any substantial difficulty can be occasioned in the consideration of the case by the particular position of the *Metropolitan Railway Company* with reference to any interest in the contract. What we have to consider is this:—How far the defendants are liable in respect of this mischief which occurred, not through the actual operation or proceeding of any servants of theirs, but through a mischance which occurred (whether by negligence or otherwise it is not particularly important, so far as the Defendants are concerned, to say) in the execution by other persons of a work constructed over their railway. [His Lordship having stated the proceedings up to the trial, said:—]

The case was tried originally, I think, at the *Surrey* Assizes, and there, after evidence had been entered into for the Plaintiff and none had been given by the Defendants, the Judge made an order in this form:—"On the suggestion of the learned Judge a verdict was, by consent, entered for the Plaintiff, subject to leave reserved to the Defendants to set it aside, and instead thereof to enter a verdict for the Defendants, or a nonsuit, on the ground that there was not sufficient evidence of negligence to support the Plaintiff's case, the Court to be at liberty to draw inferences of fact and to adjudge upon the evidence." Accordingly a rule to shew cause was moved for in the form provided for by the order which had been made by the Judge. And when the matter came before the Court of Common Pleas, on the original hearing, the rule was discharged. The matter was then taken by way of appeal to the Court of Exchequer Chamber, and upon the case coming before that Court this order was made: "It is ordered that the decision of the Court of Common Pleas be reversed, and that the verdict found for the Plaintiff on the trial of the said cause at the last Summer Assizes, holden in and for the

county of *Surrey*, be set aside, and instead thereof a verdict be entered for the Defendants."

Now there is some little embarrassment in the form that "the Court is to be at liberty to draw inferences of fact and to adjudge upon the evidence." The Judges in the Common Pleas appear to have thought that the evidence as given at the trial would justify them in coming to the conclusion, in point of law, that there had been that amount of negligence on the part of the Defendants which entitled the Plaintiff to a verdict. The learned Judges in the Court of Exchequer Chamber, whose judgment was delivered by Mr. Justice *Blackburn*, seem to have been of opinion that there was not, in fact, evidence to go to a jury, for at the end of the learned Judge's deliverance of the judgment, occur these words: "Nevertheless we are obliged to find that the Plaintiff ought to have been nonsuited, and the consequence is, that judgment will now be entered for the Defendants." In form, therefore, there is some degree of embarrassment, but in substance the point which we have to ascertain is this, whether or not such a case was made out upon the evidence as to justify the Plaintiff, in law, to say that he is entitled to damages as against the Defendants for the injury inflicted upon him, occasioned, as he contends, by their negligence. For that purpose the whole of the evidence has been printed, and thus we have before us the whole case.

The circumstances of the case are these:—It is quite certain (I shall read the passage in the evidence which proves it) that there was nothing at all upon the line itself which occasioned the damage. Indeed, that is hardly contended for. It is sufficient to say that one of the first witnesses who is called, a witness of the name of *John Simpkins*, gives evidence to this effect:—He is asked this question, "There was nothing at all of any sort or kind to indicate danger to you? No, not the least; nothing at all." Then he is asked, "And you had no reason to expect any accident?" He answers "No." In fact, there was nothing in the shape of an obstacle or obstruction on the line of railway. The whole mischief which was occasioned, was occasioned by the falling of that girder which, as I stated before, was not under the control of the Defendants, but of persons employed in constructing the work.

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Now those persons were examined, and we have their evidence before us; and I think it will be well first to see the exact state of the facts. It appears that several of those girders had been passed over the railway by hand, without the slightest mischief occurring, or the appearance of any probability of mischief; but for the first time a new mode of propelling the girders across the railway was used in the case of this particular girder, which ultimately fell and occasioned the accident. The work of placing those girders is a work of great delicacy in a certain respect, because there is a mark put upon the girder, which is called the "balancing mark," beyond which it ought not to be shoved or moved in any way. If it goes beyond this mark, it overbalances itself; and if it overbalances itself, there is at least a possibility of mischief.

Perhaps the most important witness of the whole is Mr. *Henry Smith*, who gives evidence as to the damage, and as to the character of the work, and of whom the learned Judge says at the end (and I agree with the observation), that he appears to be a very intelligent man: his evidence, indeed, fully bears out that remark. *Smith* has been employed very frequently in this kind of work, and he describes it as I have described it; namely, as a work which requires some degree of attention, and as to which there would be some degree of risk if attention were not paid: he says that up to that time the steam engine had not been tried for this purpose, but that for the first time they now employed engine power; so that the girder was less completely under their power than it had been when it was moved by hand labour. The passage upon which the learned Counsel principally relied is a passage in which *Smith* gives the following evidence: "I believe you have had great experience in this sort of work? I believe I have had very nearly twenty years." "Is it a dangerous thing? It is very dangerous; we are always liable to accidents." "In moving these girders? In the moving of these girders." "Mr. Baron *Martin*: But in whose service were you? I was employed by Mr. *Malding*." Mr. *Malding* is a person who was afterwards called. Then the witness proceeds to say that this was the first attempt that they had made with a steam engine, and that the movement was by jerks; and of course a movement by jerks is not subject to the same control as a movement by hand would be.

Now it is very important to look at the end of his evidence, because, having stated that he has been engaged for twenty years in this sort of work, and that it was always liable to accidents, he nevertheless gives this evidence. He is asked by Mr. Baron *Martin*: "Has it frequently happened, or has it occasionally happened, that a girder has fallen while you were employed in this way?" to which he answers, "I never had a girder fall where I was before in my life; I have been in the work for years; I have had some slight accident, such as a man's arm broken, or something of that kind, but never lost any lives—never any one killed—we are all liable to that in our employment." Now I think we have the exact measure of the degree of danger to be ascribed to this operation. The moving of a heavy thing is at all times dangerous—the carrying of a heavy hod of mortar may be in a certain sense dangerous—if the man should slip, or if there should be any carelessness while he is proceeding up the ladder; and this work is to a certain extent dangerous: but though this man has been employed for twenty years in it, he never had an accident before. Shewing, therefore, that if due care is used there is no particular liability to an accident, and that this particular accident is to be reasonably accounted for by the fact that they now for the first time employed engine power in moving the girder, which engine power, pushing by jerks, and not by the regular movement which is obtained where human labour is employed, appears to have occasioned this mischief.

The remaining witness, *John Malding*, was the person who employed the last witness, of whom Mr. Baron *Martin* said that he was a very sensible witness. *Malding* is asked the question: Whether railway people do not usually, in similar works, employ somebody to look out? At page 37, letter B (1), he is asked: "Now, upon similar works over a railway what has been the course adopted?" And he answers: "There has generally been one of the railway company's servants there with a flag, and also to call out to the men that there is a train coming, for them to cease working; or, if there should be anything to obstruct the line, to stop the trains from coming." On his cross-examination it appears that he is speaking of works in which, for the most part, the

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persons carrying on the works of the railway were the same contractors who were carrying on the other works, and who, therefore, would be careful to attend both to the one and the other. In that state of things the question is this: Whether in the case of a railway company which is not itself carrying on the work, but the engines and trains of which have to pass a place where the work is going on, and where, undoubtedly, an accident is possible, and of course more probable than when no work is going on at all, it is under such circumstances as exist here, the duty of the railway company to employ persons to watch and see that no accident occurs owing to the negligence of other people—of people over whom the railway directors have no control? When we speak of the danger of such an accident, it must always be attributed to a want of care on the part of the persons performing the work in question, because the superintendent of these and similar works tells us that in twenty years he had never known an accident of this kind to occur. As to the execution of the work, therefore, the evidence gives every reason to suppose that it was in the hands of skilful and proper workmen, who would take all necessary care, which they are bound to do, to see that no accident occurred. Under such circumstances the question is, I repeat, whether these Defendants were bound to employ persons specially to watch and see that no accident occurred from the negligence of men whom they did not employ and over whom they had no control?

There has been a case put by one of the learned Judges in the Court of Common Pleas—Mr. Justice *Willes*—which very aptly illustrates what would be the reasonable duty of a company, like a railway company, carrying passengers for hire. He gives the case of a waggon heavily laden with goods, piled up to that enormous height to which we often see waggons piled up in this metropolis—that waggon passing along the road, and the goods being so improperly packed that a bale of goods falls upon a stage-coach and kills or injures a passenger. In that case the learned Judge was of opinion that the stage-coach proprietor would not be responsible; and I apprehend that the groundwork of that opinion is, that those who undertake the carriage of passengers are bound to take all reasonable precaution and care with reference to any danger which may reasonably be expected upon the line of road

over which they travel. An instance of that kind is given in an authority which has been cited before us—namely, an accident accruing from switches on a line of railway not being found in their proper place, and those switches not being on the line of railway which is the property of the company which is conveying the passengers, but forming part of a line over which the company has contracted to convey the passengers. They would be obliged to see that their own line of road was in perfect order, and they would be responsible for any negligence which occurred on the other line of road, whether under their control or not, if they have contracted to carry passengers over that particular piece of road; but they would not be answerable, as I apprehend, for any mischief occasioned by any matter extraneous altogether to the work in which they were engaged, and as to which they had no reasonable ground for supposing that ordinary and proper care had not been taken by those persons whose duty it was to take such care. Going back to the case of the waggon, I cannot understand why, if Mr. Justice *Willes* was of that opinion, he should not have considered the stage-coach proprietor in that instance equally liable for the goods falling off the waggon upon his passengers with the railway company in this instance; because, if we ask the question, whether there is not more danger in passing a waggon so laden than in passing over an ordinary public road under ordinary circumstances, that question must be answered in the affirmative. Anybody driving along a road, and seeing a waggon thus heavily laden, (the possibility of which being insufficiently packed must, of course, occur to any mind, its very appearance being alarming to those who pass, who must know that there is a risk—a possibility of accident,) would be bound, according to the doctrine which has been held in this case, to drive on the other side of the road, or to wait till the waggon has gone in some other direction, and he would be guilty of negligence in passing by that waggon, the risk attending the passing of which must be a greater risk than the risk of passing along an ordinary line of road. I apprehend that all that is to be done by those who carry passengers for hire is that they are bound to see that everything under their own control is in full and complete and proper order. They are bound to see, also, if there be a certain and definite risk as to which they have any know-

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ledge, or can reasonably be supposed to have any knowledge, that it is sufficiently guarded against. For instance, a trench may be dug across a road through no fault of theirs, and in such a case they could not be held to be liable; but if there is any reasonable ground for apprehending that extraordinary precaution is wanted, they would be liable. But in a case in which a work is being carried on by competent and intelligent persons accustomed to the business, and in respect to which the evidence is simply this—that although the work may be considered dangerous, the workmen employed in it have never known an accident before this time, and where the particular accident which has occurred was occasioned by a change from the cautious mode of doing the work hitherto pursued to a more incautious mode of doing it, (I do not wish to prejudge a case which may be pending in other Courts against another company)—to hold the railway company liable for an accident of that description would, I think, be extending the liability of the company for damages, in consequence of supposed negligence in not taking precautions against every remote and contingent possibility of accident, to an extent beyond anything that has been laid down in any case with which I am acquainted, and which, indeed, common sense would not warrant.

For these reasons, my Lords, I venture to move that the judgment of the Court of Exchequer Chamber be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD :—

The unusual course taken at the trial has perplexed and embarrassed a case which would otherwise have been free from difficulty. Well might Mr. Justice *Blackburn*, in his judgment in the Court of Exchequer Chamber, describe the course taken as an inconvenient one, which must not be drawn into a precedent. The Plaintiff had produced all the evidence upon which he relied to establish the liability of the Defendants for the injury which he had sustained, and had closed his case. That case involved two questions, one as to the duty of the Defendants, which was for the Judge to decide; the other, if the duty existed, whether there had been a breach of it proved, which was matter of fact for the jury. The counsel for the Defendants ought to have submitted to the Judge

that there was no evidence to go to the jury of the breach of any duty which the Defendants were by law obliged to perform. If the Judge had been of that opinion he should have directed a nonsuit (of course, with the submission of the Plaintiff), reserving to the Plaintiff the liberty of moving the Court to enter a verdict for him. If the Judge had held that there was a sufficient case for the jury, the counsel for the defendants might have tendered a bill of exceptions to the Judge's ruling, or, if the jury had found a verdict for the Plaintiff, might have moved the Court for a new trial for misdirection. Instead of one of these ordinary courses being adopted, the trial was terminated by an arrangement which has been treated in both the Courts below as reducing the question to one merely of fact, in the decision of which the Court was substituted for the jury. Yet the terms of the arrangement are, that the verdict is to be entered for the Plaintiff, but that the Defendants are to have leave to enter a verdict for them on the ground that there was not sufficient evidence of negligence to support the Plaintiffs' case. In other words, that the Plaintiffs' case failed for want of evidence; which is a question for a Judge and not for a jury. The Judges of the Court of Common Pleas having, however, undertaken the office of a jury, with which the parties had thus agreed to invest them, were of opinion that the evidence shewed that there had been a want of that proper precaution which the Defendants were bound to have adopted; and that the verdict entered for the Plaintiff by consent must therefore stand.

The Judges in the Exchequer Chamber agreed with those of the Common Pleas, that there was evidence to go to the jury that the works being carried on over the railway were such as to require special precautions, and added that if a verdict had been found by the jury against the Defendants, and they had been asked to say that it was against the weight of evidence, they could not have done so. And yet they refused to deal with the verdict of the Court of Common Pleas as if it had been the verdict of a jury, although the Court had been put by the parties in the place of a jury, with the same power over the facts. The Judges in the Exchequer Chamber, solely on the ground (as they expressed it) that the railway directors ought not, as reasonable people, to have expected that the girder would be falling down, and consequently

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were not bound to take special precautions against such an event, felt themselves obliged, on what they called "the very inconvenient reservation," to find a verdict according to their own view of the facts, quite agreeing (as they said) with their brethren in the Common Pleas on the law, and agreeing too, that there was evidence to support the verdict.

Now this being the view of the law and the facts taken by the Court of Exchequer Chamber, one feels rather surprised that the Judges should have arrived at the conclusion that judgment ought to be entered for the Defendants. If the law laid down by the Court of Common Pleas is correct, that the work going on over the railway being a work of extraordinary danger, it was the duty of the company to take precautions; and if there was evidence to support the verdict, I do not see how a Court holding these opinions could properly disturb that verdict.

But was the law correctly stated by the Court of Common Pleas, that where a dangerous work is being carried on over a railway, not for the railway company, but for other persons, and for the proper execution of which work the company is in no way responsible, an obligation is imposed upon the company to provide against a possible danger which may arise from the negligent performance of such work. I apprehend, as a general proposition of law, that no such obligation exists.

There may be circumstances of imminent danger within the knowledge of the directors of a company which may render them liable if they run into it, and thereby occasion resulting injury to a passenger; but that they are bound beforehand to provide against possible future danger arising, not from the nature of the work itself (for risk accompanies all works of any magnitude), but from the negligence of the persons employed in carrying it on, is what I cannot conceive to be the law.

And yet Mr. Justice *Willes* is of opinion that whenever there is a work of extraordinary liability to danger going on over a railway, that in itself, although the directors of the railway have no control over the work, is sufficient to oblige them to take precautions against it. The precaution which he considered necessary was the employment of a signalman; but whether for the purpose of stopping the work, or stopping the trains, he did not explain. And he

founded his opinion as to the necessity of this particular precaution being adopted, upon evidence of what had been done on previous occasions on other railways when work was going on upon them. Even if it had been shewn that the Defendants themselves had previously employed a signalman when work unconnected with their line was being carried on over it, that would not, in itself, be enough to cast the obligation upon them to take the same precaution in every other similar instance; and what had been done by other railways upon such occasions (if evidence at all) is evidence of the slightest description.

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There is, in fact, no evidence to prove that any peculiar obligation was imposed upon the Defendants in this case differing from that which under similar circumstances would attach upon any other carriers of passengers. They had no reason, from anything which had previously occurred, to anticipate that there would be any negligence in the performance of the work. Girders had been safely conveyed to their proper places by manual labour; but this mode of working was changed in moving the girder which occasioned the injury to the Plaintiff, for a donkey-engine; which, acting not by a continuous smooth movement, but by jerks, carried the girder beyond its balance, and so caused the mischief. It does not appear that the Defendants were aware of this change in the power employed on the work, and, to use Mr. Justice *Blackburn's* words, "though as reasonable persons they must have known that girders, if negligently handled, are likely to fall, they could have no reason to suppose that the persons who were doing the work would do it so negligently as to hazard the happening of such an event," and so an obligation be imposed on them to take special precautions against an apprehended danger.

I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD WESTBURY:—

My Lords, I am very happy to hear the opinions of my two noble and learned friends, because I think the decision of the Court of Exchequer Chamber, and your Lordships' affirmance of it, will go far to bring the law to its true foundation with regard to the liability of railway companies.

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I will notice in the first place the substantial part of the argument, on the liability of companies, in the Court below. It was there chiefly contended that whereas, in ordinary cases, railway companies are held liable for the wrongful acts or wilful neglect of their servants, or the workmen in their employ, in the present case it was here sought to make these Defendants liable for the acts or the negligence of persons who were not in their employ or subject to their control. I mark that, for the purpose of stating that, in my view of the case, it is quite immaterial whether the *Thames Ironworks Company*, which contracted for the execution of these works, was or not in the employ of the railway company. But the material position is this, that the contractors were, beyond all dispute, competent, responsible, and experienced persons in the construction of works of this description; and there can be no doubt that the works in question are by no means uncommon, for there is not an iron railway bridge throughout the land that has not been constructed by means of girders. We have therefore, a contract providing for certain works to be constructed over the *Metropolitan Railway*, in no respect interfering with the line of road, by contractors who are fit and trustworthy persons for the performance of the work.

Now the difference between the Court of Common Pleas and the Court of Exchequer Chamber is this:—The Court of Common Pleas puts out of view that contract, and the obligation resulting from it on the part of the contractors, and also the matter of the railway company being entitled to rely upon the adequate performance of that contract. Taking, therefore, a one-sided view of the liability of the railway company, as though there had been no interposed liability between the railway company and the contractors, the Court of Common Pleas arrived at the conclusion that the railway company was under an obligation to take unusual precautions during the construction of these works. What effect the contract had upon the obligation of the railway company was not in any respect considered by the Court of Common Pleas. But it was a material element in the matter, because the law unquestionably is, that the railway company had a right to depend upon the experience and skill, and sufficiency and care of the contractors. And when Mr. Justice *Blackburn* in the Exchequer Chamber

directed attention to that view of the case, the conclusion (which in the report is better given than it is in the printed papers) was expressed by him in a very short and felicitous manner. He said, "We unanimously come to the conclusion that the persons whose duty it was to take precautions were the persons by whom the work was being carried on; and that though the Defendants, as reasonable persons, must have known that girders, if negligently handled, are likely to fall, they could have no reason to suppose that the persons who were doing the work would do it so negligently as to hazard the happening of such a result."

Now there has been on the part of the learned Judges of the Court of Common Pleas a complete *petitio principii*. They set out in their propositions with assuming this, that the railway company was under an obligation. The truth is, that the contractors were under the obligation—and the question is, whether in law the railway company had a right to rely on the contractors fulfilling that obligation.

As I took the opportunity of stating, in the course of the argument, to the Counsel for the Appellants, the ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and entrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work. My Lords, undoubtedly it would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected, with all prudence, proper persons to perform the work, but that he is still under an obligation to do that which, to him, in many cases, would be impossible—namely, to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons.

My Lords, these contracts were made under the provisions of an Act of Parliament. The works were to be carried over the line of the railway. There was nothing in them, as I have already

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observed, uncommon or unusual; the girders were made to span the whole of the railway, passing from one side of the abutment to the other, and embracing both. This was a kind of work which every person concerned as a contractor has almost daily been in the habit of doing. And what my noble and learned friend read from the evidence confirms that; for one man tells you he has been doing such work continually for twenty years, and has never known an accident occur. If it were necessary to go into it (which I think it is not), it is plain to any understanding that the accident in this case arose from circumstances of which the railway company could not have been aware—circumstances which it belonged entirely to the province of the contractors to observe and regulate—that it arose from the unusual circumstance that a peculiar motive power, namely, that of a small steam engine, had been substituted by the contractors, for the first time, in moving the girders, which did not move them with a sufficiently regular and gradual motion; so that, being moved by jerks, a jerk was applied to the girder at a time when the train happened to be passing by. It was, therefore, an undefined and unknown contingency which, even if you put the contract out of the question, it could not have entered into the minds of the railway company to foresee as possible, and therefore to guard against. But, as I have said, it is immaterial to enter into that view of the matter, for the broad ground of difference between the two Courts is that which I have stated.

The first Court overlooked entirely the responsibility of the contractors, and the right of the railway company to rely on that responsibility. The other Court takes that fact overlooked by the first into account; and, founding itself upon that fact, says that the responsibility of the railway company to take any extraordinary precautions never arose, for that the Defendant had a right to rely upon the due performance of the work by the contractors.

My Lords, I have much satisfaction in thinking that this decision will greatly tend ultimately to bring the liability of railway companies to a position in which it may be found to be more consistent with law, and less with feeling and excitement, than it has hitherto been. I therefore concur with great pleasure in the motion that the judgment of the Court of Exchequer Chamber be

affirmed, and that this appeal be dismissed, and be dismissed with costs.

LORD COLONSAY:—

My Lords, I entirely concur in the law as now laid down, I think properly, in this case. At the same time, there is another element which I think should be attended to, and it is this: that if the operation which the *Thames Ironworks Company* was performing was one which, according to previous knowledge and experience, however carefully performed, was likely to lead to mischief, I think it would then have been incumbent on the railway company to foresee it and to take precautions against it. But I do not see in the evidence, which we are entitled to look into, anything which raises that state of facts in this case. I think it was an operation which, according to all experience, has been performed times out of number without any injury resulting from it, without any fall of a girder at all; and, therefore, the fall of the girder was not a thing which the railway was bound to contemplate as a probable, or hardly possible occurrence, if due precautions were taken. That being so, I think there was no negligence on the part of the Defendants in not having stopped the train or stopped the operations of the people who were performing the work. The mischief seems to have occurred from a new mode of placing the girder, quite unanticipated by the railway company, and apparently not attempted before by any one, but which, unfortunately, resulted in this occurrence. Under these circumstances, I think that the contractors were the primary parties liable, and that there was no such negligence on the part of the Defendants in the duty which they owed to their passengers, as to subject them to liability for damages.

*Judgment of the Court of Exchequer Chamber  
affirmed, and appeal dismissed with costs.*

*Lords' Journals, 9th March, 1871.*

Attorneys for the Appellant: *Harcourt & Macarthur.*

Attorneys for the Respondents: *Burchells.*

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| 1870<br><u>      </u><br>July 7.<br><u>      </u><br>1871<br><u>      </u><br>March 13.<br><u>      </u> | THE PROPRIETORS, &c., OF THE ENGLISH<br>AND FOREIGN CREDIT COMPANY,<br>LIMITED . . . . . | } | PLAINTIFFS<br>IN ERROR; |
| AND                                                                                                      |                                                                                          |   |                         |
|                                                                                                          | LUDOVICO ARDUIN AND OTHERS. . . . .                                                      | } | DEFENDANTS<br>IN ERROR. |

*Contract by Letters—Bills of Exchange.*

*7Ch 590, 3,* If the person who receives a letter containing the terms of a proposed agreement writes an answer reciting those terms, and declaring his acceptance of them, he cannot, in any way, vary the effect of them without distinctly calling the attention of the party making the offer to the fact of his desire to do so.

The mere addition of words which, *primâ facie*, do not import a variation will not be sufficient to change the conditions of the agreement.

*A.* wrote to *B.* saying: "I have been requested to grant a credit in favour of *C.*, and I consent to do so, and authorize you to draw upon me for *C.*'s account, for the sum of £15,000 in drafts at three months' date, which I engage to have renewed three times by drafts of the same date, *making the currency of the credit twelve months in all*, provided you give me an undertaking to furnish me with funds to *pay each set of bills previous to maturity*, in order to keep me out of cash advance." *B.* answered, copying and adopting this letter, but after the last word, "advance," adding "*for the said twelve months.*" In the next part of *B.*'s letter was this sentence: "We take note of the said credit, and subscribe to the engagement of *renewing three times our drafts*, with furnishing you with the funds to pay the drafts renewed, in order to keep you out of cash advance *for twelve months.*" Bills were drawn and renewed under this agreement. The last renewals became due a few days after the expiration of twelve months from the date of *B.*'s letter:—

*Held*, that the agreement was, in substance, to "pay each set of bills previous to maturity," and that *B.* had not satisfied it by keeping *A.* out of cash advance for the first bills and the first and second renewals, but was bound to keep *A.* out of cash advance for the last-renewed bills.

**T**HIS was an appeal on a Case stated under the *Common Law Procedure Act, 1852*.

The Plaintiffs were constituted a corporation under the *Companies Act, 1862*. The Defendants were bankers carrying on business at *Turin*.

There was a scheme in *Italy* for the construction of the *Calabro Sicilian Railway*, and Messrs. *Vitali & Co.* became the contractors

in chief for carrying it into execution. Messrs. *Trueman & Fry* became the contractors under them. The Defendants had acted as bankers to *Trueman & Fry*, but these persons requiring large sums of money to enable them to complete the contract, and the Defendants declining to give them farther credit without some security, the Plaintiffs were applied to for the purpose of getting them to open a credit in favour of *Trueman & Fry* to the amount of £15,000, bills for which were to be drawn every three months, and the credit was to be kept open for twelve months. The Plaintiffs, by a resolution of the directors of the company, dated the 27th of December, 1864, acceded to the application. On the 19th of January, 1865, the manager for the Plaintiffs wrote from the office of the *English and Foreign Credit Company* the following letter, addressed to the Defendants :—

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“Messrs. *Arduin & Co.*—Gentlemen—At the request of Messrs. *Trueman & Fry*, on behalf of the company, I hereby authorize you to draw upon the same, for their account, for the sum of £15,000 sterling, in drafts at three months’ date, which I engage to have renewed three times, by drafts of the same date, making the currency of the credit twelve months in all, provided that you give us an undertaking to furnish me with funds to pay each set of bills previous to maturity, in order to keep this company out of cash advance ; this credit to be drawn within three months of this date.”

The Defendants’ answer was as follows :—

“*Turin*, 26th January, 1865.

“To the *English and Foreign Credit Company*, 3, *Winchester Buildings*, *London*.

“Gentlemen—We beg to acknowledge receipt of your valuable favour 19th inst., by which you authorize us to draw on your respectable company for the account of our mutual friends Messrs. *Trueman & Fry*, of your city, the sum of £15,000 sterling, in drafts at three months, to be renewed three times by drafts at the same date, making the currency of the same credit twelve months in all, providing we give you an undertaking to furnish you with funds to pay each set of bills previous to maturity, in order to keep you out of cash advance *for the said twelve months*.



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“ We take note of the said credit, and subscribe to the engagement of renewing three times our drafts with furnishing you with funds to pay the drafts renewed, in order to keep you out of cash advance *for twelve months* (1). In consequence of the same credit, we have drawn upon your company (as per mems. here inclosed) £15,000, at three months' date, of ourselves, which drafts we recommend to your best protection, to the debit of our mutual friends Messrs. *Trueman & Fry*.”

The letters were posted when dated, and the Plaintiffs received this letter of the Defendants on the 30th of January, 1865. The Defendants, on the 26th of January 1865, the date of their letter, drew on the Plaintiffs several bills of exchange, amounting, in the whole, to £15,000, all payable in *England* three months after date. All were duly accepted and paid, the Defendants, according to the arrangement, regularly remitting good bills to cover their amount. The same course was pursued in April and July. In the month of October, 1865, the Defendants at *Turin* drew other bills on the Plaintiffs, amounting in the whole to the sum of £15,000, by way of renewing the bills of July, and several of the July bills, amounting in the whole to £11,000, were given up to the Plaintiffs on their accepting these bills drawn in October. Three of these last bills were due on the 24th of January, 1866. Having been indorsed and negotiated by the Defendants, they were on that day presented to the Plaintiffs by the holders, and were paid, whereby the Plaintiffs came under a cash advance to the amount of £1020. The Defendants had also drawn seven other bills, dated the 23rd October, 1865, for sums amounting to £2980, and ten other bills, dated the 26th of October, 1865, for sums amounting to £11,000, making in the whole the agreed sum of £15,000. The seven bills for £2980, dated the 23rd of October, became due in *England* on the 26th of January, 1866, and the ten bills for £11,000, dated the 26th of October, became due on the 29th of January, 1866; and all these bills being duly paid by the Plaintiffs, they came under additional cash advances for £2980 and for £11,000. The Defendants did not furnish any

(1) The words here printed in italics were added by the Respondents, but no special reference was made to them when so added.

means to the Plaintiffs to keep them out of cash advances for these various bills.

The Plaintiffs, after some correspondence on the matter, brought an action in the Court of Exchequer against the Defendants to recover the amount for which they had thus come into advance. Judgment was given for the Defendants, and that judgment was affirmed in the Exchequer Chamber. This appeal was then brought.

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Sir *R. Palmer*, Q.C., and Mr. *Mellish*, Q.C. (Mr. *Littler* was with them), for the Plaintiffs, contended that the undertaking of the Defendants was to furnish funds to meet each set of bills drawn within the twelve months as renewals for the first set. If the Defendants intended in any way to vary the terms of the agreement they were bound to call attention to the proposed variance. They had not done so by making special reference to the words added by them to the letter agreeing to grant the credit, and the words themselves did not suggest the meaning now sought to be put upon them.

Mr. *Joseph Browne*, Q.C., and Mr. *F. M. White*, for the Respondents, contended that by the precise words of the agreement the Defendants were only bound to keep the Plaintiffs out of cash advance for twelve months from the date of the agreement, that they had, in fact, literally performed that agreement, and that any bills becoming due after the expiration of the twelve months were not included in the agreement, and could not be made the subject of the action. The terms of the Defendants' letter were precise, "for the said twelve months," and their undertaking for that time had been duly performed.

Mr. *Mellish*, in reply.

THE LORD CHANCELLOR (Lord *Hatherley*) :—

My Lords, this case which comes before us in Error from the decision of the Court of Exchequer Chamber, is one which involves a considerable amount of money, but which is dependent upon a very simple contract, a contract the terms of which are to be

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gathered from two letters, and two letters only, in the case:—[His Lordship here stated the origin of the transaction.] The short point, therefore, of the case is involved in those two letters:—[His Lordship read the first letter.] This proposal appears to be one of the simplest character, which can only be understood in one sense. And my only surprise is, that any of the learned Judges in the Court below should have understood it in a different sense. It seems to me that the proposal is simply this:—Some gentlemen have applied to us, who are desirous of having a credit, we grant them a credit of £15,000 sterling. There is no intention—I do not say that they say there is asserted to be any—but there is no intention, upon the face of this letter, to benefit Messrs. *Trueman & Co.* by anything more than a credit. There is no intention on the part of the English company to make any advance to *Trueman & Co.* in cash. All that is intended to be given is the credit of the company's name, and that is expressed in appropriate terms: "We authorize you to draw for £15,000 sterling, in drafts at three months' date." They engage to renew these three times by drafts at the same date, making the currency of the credit twelve months in all. And they are to have an undertaking from the Italian bank to furnish the English company with funds to pay each set of bills, every time they are renewed, previous to maturity, "in order to keep this company out of cash advance. This credit to be drawn within three months of this date."

Now, if that letter had been accepted *simpliciter* there would not have been any room for argument in the case. It appears, however, that the letter which accepts it does not accept it precisely in the very words in which the letter itself is couched:—[His Lordship read the accepting letter dated the 26th of January, 1865.]

My observation upon that is this: the proposal itself appears to me to be a plain one. The original proposal itself is recited *totidem verbis*, as it was expressed. It is, therefore, understood clearly by those who received it. They distinctly shew that they have clearly understood what the proposition is, by reciting the proviso of that proposition, which of course must be taken as a part of the agreement itself. And in reciting the proviso they recite it correctly down to the words which they add, "for the said twelve months,"

and before arriving at those words what is it they do recite? They say, "providing we give you an undertaking to furnish you with funds to pay each set of bills" (that is, all the bills that may be drawn) "previous to maturity, in order to keep you out of cash advance for the said twelve months." Those words, "for the said twelve months," are added by themselves.

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Now let us see what is farther added: "We take note of the said credit and subscribe to the engagement of renewing three times our drafts, with furnishing you with the funds to pay the drafts renewed;" that is, they are to renew all the drafts and to pay all the drafts. That is, again, simple and clear. But then again they say, "in order to keep you out of cash advance for twelve months."

Now, if they have understood the proposition made by the other parties, whatever doubt there might have existed from the introduction of the words, "for the said twelve months," there is no doubt of their accepting this proposal that the bills shall be renewed in this form, and there is no doubt of their accepting the proposal to find funds before those bills become due, in order to pay each set of bills. But then it is said that a doubt is introduced by their adding the words, "for the said twelve months." But if the proposition is clearly accepted, although they have added to the form of the promise the words, "for the said twelve months," those words "for the said twelve months," appear to me to import no additional term to that contract which they so clearly and explicitly shew that they have understood.

My Lords, I must, of course, say one word upon the decision which has been come to first by the Court of Exchequer, and afterwards by the Court of Exchequer Chamber, which I cannot bring myself to concur in. It has been thought that this is not a pure and simple acceptance of the proposition, but that it is an acceptance qualified by a new condition, namely, the condition that the other parties were to be kept out of cash advance, not by the means of paying the bills, which was the distinct undertaking, as each set of bills was renewed, but that they were to be kept out of cash advance in this fashion, that inasmuch as the last set of bills which would be renewed would, with days of grace, run beyond a twelvemonth from the time of the first set of bills being drawn, there was an intention on the part of the Defendants, when



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accepting the conditions, to limit the proposal by this new term or condition, by which the Plaintiffs were in reality to pay the last set of bills when they became due, or, in other words, to be the persons making the payment, or being "under the advance," of the £15,000.

That appears to me to be a proposition utterly inconsistent with the whole character of the original letter, which is a letter of credit and nothing more, not a letter agreeing in any way to make advances to *Trueman & Co.*, nor a letter reciting on the part of the Plaintiffs (the English banking company) that they would make advances to *Trueman & Co.* If it was intended by those words to make any such serious variation in the contract as that would be, that the cash advance was only to be postponed to the end of the currency of the twelve months, and was then to come into operation, before the days of grace should have expired for which the last set of bills were to be renewed, I think the Defendants were bound to say: "Mind, we are not going to pay you each of the sets of bills, which is what you ask us to do, but we are going to pay each set of bills except the last. The last set of bills we do not intend to pay." That would have been the mode in which such a variation in the proposed agreement should have been made, if it was not intended to be a simple acceptance of the agreement. But that does not appear to have been done, and it is not a necessary interpretation of the words, "in order to keep you out of cash advance for the said twelve months;" we are not to take those last words as meaning that which the learned Judges in the Court below have held them to mean, namely, an engagement in such a form as to save the Italian company from the effect of the express stipulation "to pay each set of bills previous to maturity," which are the original substantial words of the agreement.

I can quite well understand the introduction of those words, "for the said twelve months." It was said that the Plaintiffs' counsel below were placed in a difficulty; that they could give no possible explanation why those words were introduced. They are not very apt undoubtedly, but I can quite understand why they were introduced. The original proposal was this: "We engage to renew the bills three times by drafts at the same date, making the

currency of the credit twelve months." By which it was meant: "We will keep the bills afloat; we will take care that these gentlemen shall never be molested by any one for the £15,000 during the twelve months. By pledging our credit we will keep them afloat for that time." The words, "for the said twelve months," introduced at the end of the clause, "in order to keep you out of cash advance," are somewhat awkwardly introduced, but they have reference solely to that proposal: "We will give you a currency of credit for twelve months."

Now, my Lords, I will notice very shortly the judgments in the two Courts below. The judgment in the Court of Exchequer was very short on the part of the Lord Chief Baron. He says: "The simple ground on which we are bound to decide this case in favour of the Defendants is, that the Plaintiffs, being protected against cash advances for twelve months, they have been protected against cash advances for twelve months whenever the 26th of January 1866, arrived." That is to say, in other words, that they, being protected during the currency of all the bills up to the time of the last bill being within three days or so of becoming due, then, because it was not until three days beyond the twelve months that that bill would, according to English custom, become due, they have been protected from cash advances for twelve months. But I would ask, on the other hand, what becomes of the engagement "to pay each set of bills previous to maturity?" There is nothing at all in this interpretation which meets those words, which are plain, simple, and explicit in themselves.

Then Baron *Martin* takes pretty nearly the same ground, for he says: "The Plaintiffs are to make out that the Defendants had contracted with them to supply them with funds to pay the bills which became due on the 26th of January, and they would be able, if they made that out, to maintain an action on simple contract, or it might be possible to maintain an action for money paid—that is the same question—but they must make out that fact, and not that it passed in their minds, which possibly it did, from what Mr. *Quain* says, that that is what they meant, but they must make out that that is what the Defendants meant. From what the Lord Chief Baron has said, it is as plain as words can be, that the Defendants never meant anything of the sort, but what they

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did was that the Plaintiffs were not to be called upon to pay their acceptances during the twelve months." That is to say, there were to be three sets of bills for which they were to supply the funds, but for the last they were not. Now, where the learned Baron finds that passes my comprehension. There is a plain and distinct engagement to pay three sets of bills, but he says there is no agreement to pay the last. Where he finds that it is utterly beyond my power to discover.

Then Baron *Bramwell* goes upon the first letter. He says: "If there was not a very large amount I should not make any remark, but it is to some extent due to the Defendants to make an observation or two upon it. I have looked at the agreement very carefully. Now just make it stop where I am going to read, 'At the request of Messrs. *Trueman & Fry*, on behalf of the company, I hereby authorize you to draw upon the same, for their account, for the sum of £15,000 sterling.' Suppose it stood there, it would mean this, 'If you will advance £15,000 to *Fry*, you may draw upon us for it;' that would be the meaning of it. Now, what goes on afterwards? All that goes on afterwards is—not stipulations for repaying or indemnifying the Plaintiffs, but stipulations for the purpose of shewing that *Trueman & Fry* were to have the benefit of that for the twelve months without being called upon to pay, and that in the meanwhile the Plaintiffs were not to be under cash advances. If you apply that clue, as it seems to me, to the interpretation of the Plaintiffs' letter it is plain, because it goes on, 'on drafts at three months' date, which I engage to have renewed three times by drafts of the same date, making the currency of the credit twelve months in all.'" The learned Judge therefore says: I read the first part of the letter as if it stood alone. I concur with him in that view. If it stood alone, it would be an engagement by certain persons who say, "If you draw upon us for the sum of £15,000 sterling we will honour the drafts." But, of course, by stopping there you leave out altogether the words relating to the engagement to renew the bills "three times by drafts of the same date, making the currency of the credit twelve months in all," that being the object of the whole.

The learned Baron proceeds: "Then comes this: 'provided that you give us an undertaking to furnish me with the funds to pay

each set of bills previous to maturity in order to keep this company out of cash advance.' I own if it stood there I should say 'each set of bills' must mean previous to maturity, each set of bills for which it was necessary for the funds to be furnished in order to keep them out of cash advance for twelve months."

I apprehend that when these parties agreed to give a credit for twelve months, and only a credit for twelve months, and when they said, "We will do it by means of a set of bills, you keeping each set of bills paid," it must mean each set of bills not excluding the last; interpreting it by that passage, which is actually repeated in the answer, "in order to keep us out of cash advance." And though I differ with a great degree of regret from the judgment of Mr. Baron *Bramwell* in such a matter, yet at the same time I must say this is a simple question of construction of an instrument, and I cannot bring my mind to construe it in any other way than I have done.

Then Mr. Justice *Byles*, in the Court of Exchequer Chamber, where there were five learned Judges, delivers a judgment in which two of the other learned Judges express concurrence. Unfortunately, we have only a shorthand writer's report of the judgment, the first part of which is absolutely unintelligible, which I am sure is not Mr. Justice *Byles*' fault; but it must be some fault of the writer (1). It runs thus: "We are all of opinion that the judgment of the Court of Exchequer in this case was right. Speaking for myself and for some other members of the Court I think that that construction may properly be put even upon the Plaintiffs' first letter: 'I hereby authorize you to draw on Messrs. *Trueman & Fry* for their account for the sum of £15,000 sterling, on drafts at three months' date, which I engage to have renewed,' not paid, 'three times by drafts of the same date.' Now he has stated the reason why that is done, 'making the currency and the credit twelve months in all.' That is to say, making the time during which you will be relieved from the obligation of taking up the bills twelve months and no longer. We will pay the three first sets." This is to me quite unintelligible. "We will pay the

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(1) The case did not appear in the legal reports of the Courts below, and all these extracts from the judgments are taken from the papers printed by the parties.



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three first sets," that is, the Defendants will pay the first three sets, "but not the last." Here the learned Judge is coming round to the interpretation put upon it by Mr. Baron *Martin* and afterwards by Mr. Baron *Bramwell*, that the undertaking to pay each of the sets only means the first three, but not the last. The learned Judge goes on:—"We will pay the three first sets, in other words, but not the last, which in the ordinary course will be due, and actually did become due, after the twelve months. I should say that that is the sense in which the Defendants wrote that letter." He has only spoken before of the Plaintiffs' letter, and has commented upon the Plaintiffs' letter. I am very sorry that we have only such an imperfect report of a judgment of Mr. Justice *Byles* upon an important mercantile matter like this, that learned Judge being so particularly conversant with the law relating to bills and other mercantile matters. But we are quite unable to benefit by his judgment in this case, or to read this report of it as anything more than an expression of his concurrence with the judgment of the Court below, for it is scarcely possible to follow the reasoning as given in this report.

Then he goes on to say, "I should say that that is the sense in which the Defendants wrote that letter; but it is to be observed that they mention the twelve months more than once; they say, 'We beg to acknowledge the receipt of your valuable favour of the 19th instant, by which you authorize us to draw on your respectable company for the account of our mutual friends Messrs. *Trueman & Fry* of your city, the sum of £15,000 sterling, in drafts at three months, to be renewed three times by drafts at the same date, making the currency of the same credit twelve months in all,' *in all* 'providing we give you an undertaking to furnish you with funds to pay each set of bills previous to maturity.' I conceive that to mean each set of those bills which, by the previous arrangement, we were bound to pay and take up. Now they adopt the expression again 'twelve months,' 'in order to keep you out of cash advance for twelve months.' The letter proceeds, 'We take note of the said credit and subscribe to the engagement of renewing three times our drafts with furnishing you with the funds to pay the drafts renewed in order' (this is the intention with which the whole of this contract was entered into) 'in order to keep you

out of cash advance for twelve months' as if it had been 'in order to keep you out of cash advance for twelve months and no longer.' In consequence of the same credit we have,' &c. It seems to me, therefore, that the Defendants' letter is quite plain, and then, as I ventured to suggest to Mr. *Mellish* some time ago, if the Plaintiffs' letter and the Defendants' letter are read together, this seems to me to be the plain result of the contract, for it is not to be forgotten that the Plaintiffs have acted upon the Defendants' letter. If, on the other hand, the Plaintiffs' letter means one thing and the Defendants' letter another, then there was no contract, so that in either view of the case the nonsuit of the Court below was right."

Now, I have not forgotten that the Plaintiffs acted upon the letter. I think that the circumstance of the Plaintiffs acting upon the letter is a point of very considerable importance in the case; because when the other gentlemen answered the first letter, reciting its proposal quite correctly, but adding to the proviso those words which have given rise to the difficulty in this case, "for the said twelve months," if they intended to enter into an entirely different contract, a contract so different as this, that instead of paying all the bills they were only to pay three sets out of the four, that was so material an alteration of the original proposal that it was their bounden duty not to accept the advance without calling the attention of the other parties specially to that important variation. I do not think that if it was so meant (and certainly I do not think it was so meant) the addition of these words to the recital of the proviso could be effective to change the whole course of the transaction, or the liability of the Defendants to pay each set of bills, as they engaged to do. Although it may be somewhat difficult, without any other information, to explain now the grounds of their so introducing those words, I think they are sufficiently consistent with the terms of the original letter, and with the terms of the main part of the proposal, (it being a credit and not an advance of money that was intended, from first to last, by the English company,) to enable us to say that the Plaintiffs ought to have been allowed to recover in this action; and therefore that the judgment of the Court of Exchequer Chamber and the judgment of the Court of Exchequer thereby affirmed should be reversed.

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LORD WESTBURY:—

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My Lords, the respect which I entertain for the Judges in the Courts below, from whom we are obliged to differ in this case, and the subtle nature of their reasons, have induced me to enter more fully into the merits of this case than, after my noble and learned friend's judgment, I should have thought it necessary for me to do; and having written my opinion, I cannot now well condense it into the few observations to which otherwise I should have wished to limit myself; and I must therefore bespeak your Lordships' patience while I read what I had previously written.

The decision of this appeal depends on the legal construction of the two letters dated the 19th of January, 1865, and the 26th of January, 1865, in which is contained the contract between the parties. The question may be thus stated: Was the offer and proposal of the Appellants, contained in the letter of the 19th of January, simply accepted by the Respondents in their letter of the 26th of January; or was it accepted with a qualification or condition?

The true meaning of the letter of the 19th of January must be first ascertained. It appears to be clear and unambiguous. Authority is thereby given by the Appellants to the Respondents to draw bills on the Appellants, on account of *Trueman & Fry*, for the sum of £15,000 at three months, which bills the Appellants engage to accept, and to renew three times by drafts of the same date (that is, three months), making the currency of the credit twelve months in all, provided the Respondents undertake to furnish the Appellants with funds to pay *each set* of bills previous to maturity, in order to keep the Appellants out of cash advance. So that there it is positively stated that they were to be kept out of cash advance—not kept out of cash advance for twelve months. This proviso or condition overrules the whole of the letter, and is most express and definite. The Respondents are to bind themselves to find funds to pay each set, that is, each of the four sets of bills, previous to maturity, whenever that may be; but which according to the scheme of the letter would be before or at the end of twelve months from the first acceptance of the Appellants, thereby making the currency of the credit given by the Appellants twelve months in all.

Now the answer (dated the 26th of January, 1865) of the

Respondents to this letter of the Appellants has been construed by the Courts below as amounting to this: We, the Respondents, will find funds to pay the first three sets of bills, but not to pay the fourth or last set of bills, which you, the Appellants, must yourselves provide for. Thus the Lord Chief Baron says: "The Respondents gave a limited guarantie for twelve months, and the last or fourth set of bills were not properly payable until after the 26th of January, 1866, when the twelve months and the guarantie expired." And he founds his conclusion on the words, "for the space of twelve months," which the learned Judge cites as if they were contained in the Respondent's letter, which they are not, but probably the Lord Chief Baron intended to cite the concluding words of the first paragraph of the Respondent's letter, namely, "in order to keep you out of cash advance for the said twelve months," or, as afterwards expressed, "for twelve months." So Baron *Martin* treats it "as clear and plain as words can be," that what the Respondents meant was that the Appellants "were not to be called upon to pay their acceptances during the twelve months, that is to say, there were to be three sets of bills for which they were to supply the funds, but for the last they were not." In giving the judgment of the Court of Exchequer Chamber, Mr. Justice *Byles* adopts the same view of the meaning of the letters, and treats the Respondents as saying by their answer: "We will pay the three first sets, in other words, but not the last, which in the ordinary course will be due, and actually did become due, after the twelve months."

It was admitted by the Respondents' counsel in argument that the usual three days allowed by the custom of merchants were not to be included in the computation of the twelve months, and did not affect the construction of the contract.

With respect to the construction of the two letters, but for the decisions in the Courts below I should have regarded the meaning of the parties as being clear beyond dispute. What is offered by the Appellants in their letter of the 19th of January is a loan of credit, not of money, for twelve months, to be effected by the acceptance of a set of bills for £15,000 at three months, such bills to be renewed three times by bills of like date, thereby making the credit current for twelve months, on condition that the Respondents should find funds to pay each set of bills previous to maturity

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—that is, previous to the expiration of twelve months from the date of the first acceptance—in order that the Appellants might be insured from having to make any cash advance by reason of their acceptances. This is the plain intent and meaning of the Appellants' letter.

When we take up the letter of the Respondents in answer, it appears to be a letter of general acceptance, and not of refusal or qualification. The first sentence is intended as a recital or statement of the effect of the Appellants' letter. It is not very accurately worded, as the writers were not versed in English composition, but it is plainly intended by the writers as a citation or repetition of the letter they were answering. The answer to the Appellants' offer is contained in the next sentence, which is in these words: "We take note of the said credit, and subscribe to the engagement of renewing *three times* our drafts with" (the word "with" is plainly used by the foreign writer as equivalent to the conjunction "and" —that is to say, "together with") "furnishing you with the funds to pay the drafts renewed, in order to keep you out of cash advance for twelve months." In this sentence the Respondents shew clearly, first, that they understood the Appellants to offer a loan of credit, not cash, for the words are, "We take note of the said credit;" secondly, the Respondents subscribe to, or accept, the engagement (that is, the engagement required by the Appellants' letter), and which engagement the Respondents go on to describe as being an engagement of renewing *three times* our drafts, *with* (that is, together with) "furnishing you" (the Appellants) "with the funds to pay the drafts renewed"—that is, all the renewed bills, or, as expressed in the Appellants' letter and in the first sentence of the Respondents' answer, "each set of bills previous to maturity." And the sentence of the Respondents' letter closes with the words, "in order to keep you out of cash advance for the said twelve months," words which have not, and never were intended to have, the effect of annulling or restricting the positive engagement required by the one party and given by the other, viz., that the Appellants should be furnished with funds by the Respondents to pay *each set* of the renewed bills.

The judgments of the Courts below turn on the words that follow, and which have been already commented on, namely, "in

order to keep you out of cash advance for twelve months," which have been held to control and, in effect, annul the positive engagement of the Respondents to find funds to pay each set of the renewed bills. But the judgments of the Courts below do not appear to me to be in accordance with the true meaning of the letters, or with the settled rules of construction. The words, "in order to keep you out of cash advance for twelve months," in the second paragraph of the Respondents' letter, must mean the same thing as the words in the first paragraph of the same letter, "in order to keep you out of cash advance for the *said* twelve months;" but in this latter place the word "said" refers to the preceding words, "making the currency of the same credit twelve months in all;" and therefore the expressions, "for the said twelve months," or "for twelve months," denote the same thing as the words, "during the currency of the credit." And this is confirmed by the fact that these words are first found in the opening paragraph of the Respondents' letter, which professes to state the effect and purport of the letter of the Appellants. Thus explained, the words would mean, "in order to keep you out of cash advance during the currency of the said credit," making the engagement of the Respondents and the credit given by the Appellants co-extensive.

But whether this be or not the true intent with which the words were used is, in my judgment, immaterial; for the truth and substance of the case are, that the offer contained in the letter of the Appellants is frankly accepted by the Respondents, and that there is a positive unambiguous engagement by the Respondents to renew the drafts three times, and furnish the Appellants with funds to pay the drafts renewed previous to maturity; and it would be contrary to reason and every rule of construction to put an interpretation upon ambiguous words that shall defeat or qualify words which are clear and express. These words should receive an interpretation which is consistent with the intent and object of the instrument in which they are found, and with the positive contract which is contained in the rest of that instrument.

I am of opinion, therefore, that the judgments of the Courts below must be reversed, and the nonsuit set aside, and a verdict and judgment entered for the Plaintiffs in the action. That, I

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apprehend, will carry the costs in these proceedings, to which I conceive the Appellants, the Plaintiffs, are justly entitled.

LORD COLONSAY:—

My Lords, the opinions which have now been expressed necessarily determine the judgment in this case, and whatever may be the conclusions that I have formed with reference to it they cannot have any practical effect upon the result of this appeal. The time, too, of this House is valuable, and I am always averse to occupy unnecessarily any part of it. Nevertheless, having regard to the antecedents of this case, in which we are asked to reverse a unanimous judgment of the Court of Exchequer, affirmed by the unanimous judgment of the Court of Exchequer Chamber, I think it is due to the parties, and fitting, that I should not confine myself to merely announcing the result at which I have arrived, but that I should indicate some, at least, of the considerations which have led me to that result, and I shall do this, I think, in a very few words.

My Lords, we are called upon to consider a contract contained in two letters, which may be generally described as an offer and an acceptance, the transactions having reference to the interests of a third party called “a mutual friend,” and the object being to provide that third party with funds. In construing a contract it is a settled rule that we must look to the whole terms of that contract, which in this case mean the two letters. When a contract is contained in a formal and mutual instrument, that is one thing, but when a contract is composed of an offer and of an acceptance, that is a different shape of contract; and it then becomes necessary, in the first place, to see what the offer is, and then to look at the terms of the acceptance. If the offer is ambiguous, if it fairly and reasonably admits of two interpretations, or of two different readings or meanings, and if it clearly appears, from the answer to that offer, that the party answering has read it in a sense of which the letter containing the offer was reasonably susceptible, though different from the sense in which the writer of it intended it to be taken, and if the offer be acted upon by the party answering in that sense, it would seem that the writer of the first letter containing the offer cannot force upon the other party his own interpretation of it against the interpretation of which his letter would be

reasonably susceptible, and which has been adopted by that other party. For he himself is to blame if he has written a letter which is susceptible of a double interpretation, and when he received the answer, if that answer clearly shewed upon the face of it that the writer of the answer had put upon the letter an interpretation which he (the writer of the first letter) did not intend, then it was his duty to have that matter put right, or he must be held to have acquiesced in that interpretation, or, at least, he must himself submit to any loss that he may sustain by the misinterpretation.

But there is another phase of the matter. If the letter containing the offer is clear and unambiguous, and if the party who answers that letter chooses to adject to that answer a qualification or condition, or to substitute something in place of what is offered, then the onus must rest upon him to state clearly and precisely, as if he were making a new offer (for substantially it is a new offer) what that qualification is, and for what end it is proposed.

That being the view that I take of the position of parties to contracts of this kind, I shall look, in the first place, to the letter containing the offer, and I do so with some minuteness, because the expressions which I find in the judgments of both the Courts below would seem to have put upon the letter an interpretation different from that which the writer of the letter had intended. Let us see, then, what that letter means. It was written with the object of conceding pecuniary assistance, and it is as follows:—[His Lordship read the first letter.]

Now, the question upon that letter is as to what is its import? Did the writer of it intend that the receivers of it should provide funds to meet each of the four sets of bills, or that they should provide funds to meet only three of those sets of bills? Does it mean that they should keep the parties on whose behalf the letter was written entirely out of cash advance, or only that they should keep them out of cash advance for a limited period? The letter contains an engagement on the one part, and a proposal that there shall be an undertaking on the other. What the writer engages is to have the bills renewed three times, whereby the extent of the period would come to be twelve months; and the condition which he attaches to it is, “provided that you give us an undertaking to furnish me with funds to pay each set of bills previous to maturity.”

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Now I ask what is the meaning of the expression "each set of bills?" It is a comprehensive expression. It comprehends, if taken without qualification, each of the four sets of bills; and "to keep this company out of cash advance," is to keep them entirely out of cash advance. The expression as to the providing for the sets of bills is not in this letter limited to "three sets of bills," but "each set of bills" above mentioned. "Keeping the company out of cash advance," is not limited to a period, but it means to keep them out of cash advance in respect of this transaction. I do not see that the interpretations of the letter, or the construction to be put upon those phrases of this letter, "each set of bills," and "out of cash advance," can be different whether the currency of the credit was to be twelve months or nine months or six months. All that you have to do is to change the number of renewals from three to two or to one renewal, and the credit from twelve months to nine months or six months.

Let me suppose that this had been a credit for six months, and that the letter had been to this effect: "In bills of three months' date which I engage to have renewed once by drafts of the same date, making the currency of the credit six months in all, provided that you give us an undertaking to furnish me with funds to pay each set of bills previous to maturity, in order to keep this company out of cash advance;" if the letter had been in that form there could have been no doubt that the second and last set of bills must be provided for as well as the first. No doubt, in that case, the plurality of expression so applied to the bills would baffle or stifle any ingenuity that could be applied to the construction of this letter. But the words are the same, and the construction must be the same, that whatever be the period of the credit the words "to pay each set of bills" apply to the previous renewals. Taking it to have been the intention of the writer of this letter that these words should apply to all the previous renewals, I am at a loss to see what language could be found more appropriate to express that intention. If it had been his intention that the providing of funds to pay each set of bills should apply only to three of the previous sets, that is to say, to a portion of the previous sets of bills, I do not see how he could have found less appropriate language for the purpose.

That being so, I think it is beyond doubt that the meaning of this letter is that funds shall be provided to pay each set of bills, that is, each of the four sets of bills above mentioned, and this is to be done previous to maturity, previous to the expiry of the twelve months. Therefore before the twelve months were out, it was incumbent upon the Defendants, if they accepted this proposal in the way in which it was put, previous to the expiry of twelve months to provide funds to pay the last of those sets of bills.

Then, what is the letter of the Defendants? We come now to that other consideration to which I alluded, of acceptance being made under a mis-reading of a letter in one of two interpretations of which it was fairly susceptible, when it is not the interpretation which the writer of it intended. But that view of the case is excluded here, because I think there is no room for two interpretations of the letter of the Plaintiffs. But still it is competent to a party to accept a proposal subject to a qualification. He may qualify his acceptance, that is to say, he may not take it exactly as proposed; but he may take it in another way, which would be a different contract from that which was proposed to him—and in that case it will be incumbent upon him to make it perfectly clear in his letter what that different contract is.

Now, the Defendants in answering that letter, recite the letter pretty nearly as it was written, only that at the end of the recital, after the words “in order to keep them out of cash advance,” they add “for the said twelve months,” and then they add “we take note of the said credit, and subscribe to the engagement of renewing three times our drafts with furnishing you with the funds to pay the drafts renewed,” (that in ordinary English must be taken as meaning all the drafts renewed) “in order to keep you out of cash advance *for the said twelve months.*” Now, I must say that if this was intended to be a qualification of the proposal, or a new shape of the proposal, it ought to have been stated very differently. It ought to have been stated clearly and explicitly, so as to shew that they were to pay only three sets of bills, and not the fourth set—the last renewed drafts. But it does not do so. Can any meaning be attached, then, to the words “for the said twelve months?” As to that I would say, it will be observed that the nature of this transaction was such that at different periods in the

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course of these twelve months the Plaintiffs might have been under the necessity of making cash advances, and the meaning of these words may be, that at no period of the twelve months shall they be under the necessity of making a cash advance. At the termination of each three months, unless the Defendants fulfilled their obligation, the Plaintiffs might be under the necessity of making a cash advance, and this provides that at no period of the twelve months shall they be under that necessity. That is the only way in which I can interpret those words consistently with the obligation which is plainly undertaken to pay all the drafts renewed by reciting the proposal and accepting it. It may be that the words "for the said twelve months" were merely intended as a repetition of what is contained in the original letter making the credit twelve months. That would make no difference in the case. But it is certainly not a clear announcement that they intended to pay only three of the sets of bills, and not the whole of the sets of bills, it would be at least a very roundabout way of arriving at that result.

I was very anxious to find in the judgment of the Court below what was the interpretation that was put upon the letter of the Plaintiffs, and to see whether the case was regarded by the learned Judges as being one in which there had been a misapprehension, or the acceptance of a doubtful reading of a letter which was susceptible of two readings, or whether it was that the original letter not being susceptible of two readings, a qualification was introduced in order to limit the amount of the liability of the parties, for those are two separate things. I have not been able to discover precisely what was the ground upon which the Court below proceeded. The learned Judge who gives the opinion of the Court of Exchequer Chamber certainly says, "Speaking for myself and for some other members of the Court, I think that that construction may properly be put even upon the Plaintiffs' first letter." When I read that I was exceedingly anxious to follow the learned Judge in the reasoning by which he so worked out the meaning of the Plaintiffs' letter; but unfortunately the report which we have here of his judgment does not enable me to do so, for it contains misapprehensions of fact, and a confusion of the two letters, which I cannot think emanated from the learned Judge;

and we are therefore without any satisfactory report of the reasoning by which he arrived at the conclusion that such a construction could be properly put upon the letter written by the Plaintiffs. The learned Judge quotes the letter thus: "I hereby authorize you to draw on Messrs. *Trueman & Fry* for their account." But the drafts were not to be upon *Trueman & Fry*, but upon the Plaintiffs. Then he goes on to say, "Which I engage to have renewed (not paid) three times by drafts of the same date." Certainly not paid; the Plaintiffs did not undertake to pay anything. That they were not to be paid but to be renewed is the matter upon which the Plaintiffs rest their case. Then he says: "Now he has stated the reason why that is done, 'making the currency and the credit twelve months in all.'" But that is not stated as the reason—it is stated as a winding-up or result of the bills being renewed three times, each set of bills being for three months, and there being four sets of bills, thereby making it a whole term of credit of twelve months. Then he goes on, "That is to say, making the time during which you will be relieved from the obligation of taking up the bills twelve months and no longer." The writers of the letter were not to be under any obligation to take up the bills; it was the Defendants who were to provide the funds for taking up the bills. He proceeds thus: "We will pay the three first sets in other words, but not the last." There is evidently some error in this report, which deprives me of the power of ascertaining by what course of reasoning the learned Judge had arrived at that interpretation of the letter which, according to my humble apprehension, admits only one interpretation consistently with the fair meaning of the words.

No doubt another very eminent Judge, Mr. Baron *Bramwell*, arrives, though not so certainly, at a similar result of opinion in regard to the Plaintiffs' letter, and he does so after what I must call a sort of ruthless dislocation of that letter, because he puts it in this way: "Now just make it stop where I am going to read: 'At the request of Messrs. *Trueman & Fry*, on behalf of the company, I hereby authorize you to draw upon the same for their account for the sum of £15,000 sterling.' Suppose it stood there it would mean this: 'If you will advance £15,000 to *Fry*, you may draw upon us for it,'" No doubt it does mean that—that

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was the intention of the engagement ; but it has this qualification : “ Provided you furnish us with funds to meet the bills.” Then he says : “ All that goes on afterwards is not stipulations for repaying or indemnifying the Plaintiffs ” (certainly not for repaying the Plaintiffs, because the Plaintiffs were not to pay anything—they were to be provided with funds, so that it could not be for repaying the Plaintiffs), “ but stipulations for the purpose of shewing that *Trueman & Fry* were to have the benefit of that for the twelve months without being called upon to pay ” (there is nothing said about *Trueman & Fry* paying or not paying), “ and that in the meanwhile ” (there are no such words as “ in the meanwhile,” those words are wholly interpolated) “ the Plaintiffs were not to be under cash advances. If you apply that clue, as it seems to me, to the interpretation of the Plaintiffs’ letter it is plain.” That clue, I apprehend, is not to be found in the letter. Therefore I cannot accept this interpretation.

My Lords, I think that the letter of the Plaintiffs is clear and unambiguous, and that it is not reasonably susceptible of two meanings, and I think that the answer to it does not introduce any qualification in such clear and plain terms as it would have been incumbent upon the writer of that answer to use if he intended to limit the liability not to each set of bills, but only to a portion of those sets of bills. Nor can I accept the words “ for the said twelve months ” as shewing a misreading of the Plaintiffs’ letter, because the Plaintiffs’ letter, in my humble opinion, does not admit of any doubt as to its interpretation. I am therefore entirely of the same opinion as my noble and learned friends, that the judgment of the Courts below must be reversed.

*Judgment of the Court of Exchequer Chamber reversed ;  
 and judgment given for Plaintiff in Error.*

*Lords’ Journals, 13th March, 1871.*

Attorney for the Plaintiffs in Error: *J. B. Batten.*

Attorneys for the Defendants in Error: *Hillyer & Fenwick.*

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| ELIZABETH WILLIAM COUNTESS OF<br>HARRINGTON . . . . .        | } APPELLANT;   | 1870<br>May 17, 19. |
| AND                                                          |                | 1871<br>March 27.   |
| CHARLES WYNDHAM EARL OF HAR-<br>RINGTON AND OTHERS . . . . . | } RESPONDENTS. |                     |

*Settlement—Will—Perpetuity—Chattels—Residuary Bequest.*

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A settlement made by the third Earl of *Harrington* declared the manner in which a mansion-house and certain estates in the county of *Derby* should descend.

A will of the settlor, made many years afterwards, gave personal chattels “in trust for the person or persons who for the time being shall, under the settlement of my mansion-house and estates, be in the actual possession of the same mansion-house and estates, to the end and intent that all and singular such [personal chattels] may be deemed and considered as heir-looms, to go along and for ever be used and enjoyed with the same mansion-house and estates, (so far as the rules of law or equity will permit,) but so nevertheless as that the same chattels personal shall not, as to the effect or purpose of transmission, vest absolutely in any person or persons who by virtue of any settlement shall or may become seised of or entitled to the said mansion-house and estates for an estate of inheritance, either in possession or reversion, or otherwise, unless such person shall attain the age of twenty-one years, or dying under that age, shall leave issue inheritable under the limitations in any settlement thereof”:—

*Held*, that this was not an executory devise.

The testator gave his residuary personal estate to trustees, to convert the same into money, to pay debts, &c., and lay out the surplus in the purchase of real estates to be settled to the same uses as his *Derby* estates under the settlement. The seventh Earl executed a disentailing deed of the estates.

The fourth and fifth Earls of *Harrington* were sons of the settlor and testator. The sixth Earl was his grandson (being the son of the fifth Earl), and he was also the first tenant in tail by descent; he died under twenty-one and without issue; he was succeeded by his cousin, the seventh Earl, who was likewise a grandson of the testator, and had been born between the date of the settlement and that of the will:—

*Held*, that the chattels had vested in the sixth Earl, but were divested by his death under twenty-one, and without issue; that the seventh Earl being in actual possession of the estates under the settlement, and being also absolutely entitled to the residuary estate of the third Earl of *Harrington*, had become entitled to the heir-looms and funds bequeathed by the third Earl.

*Per THE LORD CHANCELLOR (Lord Hatherley)*:—The condition in the bequest of the chattels was not annexed by way of proviso cutting down the gift, but was an essential part of it, so that no person could claim the

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gift except as being the person who could ultimately hold it by fulfilling all the qualifications attached to it.

*Per* LORD WESTBURY:—The death of the infant tenant in tail happened within the period allowed against perpetuities; the direction that the heir-looms should accompany the settled estates remains therefore *pro tanto* in full force, and carries them on to the next tenant under the limitations.

THIS was an appeal against a decree of Lord Chancellor *Cairns*, which had partly confirmed and partly varied a previous decree of Vice-Chancellor *Malins*.

In July, 1804, *Charles* third Earl of *Harrington* joined with his son *Charles*, then Viscount *Petersham* (afterwards the fourth Earl), in a settlement of the family estates (1). The mansion-house of *Elvaston Hall*, in the county of *Derby*, with other hereditaments there, and in the county of *Chester*, were settled to the use of the third Earl for life, to Viscount *Petersham* for life, remainder to trustees to preserve, &c., remainder to the first and other sons of Viscount *Petersham* in tail male, with remainders in the same manner successively to *Lincoln*, *Leicester*, *Fitzroy*, *Francis Charles*, *Henry Richard*, and *Augustus*, the other sons of the third Earl, and their respective first and other sons in tail male, with an ultimate remainder to the third Earl in fee.

On the 17th of April, 1824, *Charles* the third Earl made his will, which contained the following bequest: "Also I give and bequeath unto them, my said trustees, their executors and administrators, all my plate, china, glass, pictures, prints, drawings, and books, which shall be in or about my said house called *Harrington House* at the time of my decease; and also all my other plate whatsoever and wheresoever, and also all my linen, china, glass, pictures, prints, and drawings, household goods, and household furniture, and books, which shall be in and about my mansion-house at *Elvaston*, in the county of *Derby*, at my decease, in trust for the person and persons who for the time being shall under or by virtue of, or under the limitations contained in, any settlement of my said mansion-house at *Elvaston*, and the estates in the said county of *Derby* settled therewith, be in the actual possession of the same mansion-house and estates, to the end and intent that all and singular such plate, linen, china, glass, pictures, prints, drawings, household goods, and household furniture, and books, may be deemed and considered as

(1) See the settlement fully stated, Law Rep. 3 H. L. 295,

heir-looms to go along and for ever be used and enjoyed with, the same mansion-house and estates, so far as the rules of law or equity will permit, but so nevertheless as that the same chattels personal shall not, as to the effect or purpose of transmission, vest absolutely in any person who, under and by virtue of any settlement, shall or may become seised of, or entitled to, the said mansion-house and estates for an estate of inheritance, either in possession or reversion, or otherwise, unless such person shall attain the age of twenty-one years, or, dying under that age, shall leave issue inheritable under the limitations in any settlement thereof." He directed that a schedule or inventory should be taken of the chattels personal which he intended to go as heir-looms, and that the person taking possession of the same should give a receipt for the same at the foot of the schedule, with an undertaking to preserve the same in good plight, reasonable wear and tear excepted.

The residuary personal estate was given to the trustees to convert the same into money, to be invested in the purchase of other real estates, to be settled in the same way as the mansion-house at *Elvaston* and the estates in the counties of *Derby* and *Chester*.

The third Earl died in September, 1829, and was succeeded by his son *Charles*, who became fourth Earl of *Harrington*. *Lincoln Stanhope*, the second son of the third Earl, died without issue in 1840. *Charles*, the fourth Earl, died in March, 1851, leaving no male issue, and the title and estates then devolved on *Leicester Stanhope* (the third son of the third Earl), who became the fifth Earl. He died in September, 1862, and was succeeded by his only son *Seymour Sydney* the sixth Earl, who died in February, 1866, before he had attained twenty-one, and without issue male. The Respondent *Charles Wyndham*, the eldest son of *Fitzroy Stanhope* (who had died some years before), was born in 1809, and on the death of his cousin in 1866 succeeded as the seventh Earl. He had since executed disentailing deeds of the estate.

On the 15th of March, 1866, the Appellant, the mother and administratrix of the sixth Earl, filed her bill against the Respondent and the other necessary parties, praying that the trusts of the will of the third Earl might be carried into effect, and that it might be declared that the Appellant, as the administratrix of her late son, the sixth Earl, was entitled to the plate and chattels, &c., under the provisions of the said will.

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The Respondent put in an answer to this bill, and in September, 1866, filed a cross bill, claiming the said plate and chattels as having become his absolute property on the death of the sixth Earl under twenty-one, and without issue.

The cause was heard before Vice-Chancellor *Malins*, who, on the 1st of May, 1867, pronounced a decree by which the bill of the Countess was ordered to be dismissed, and it was declared that the personal chattels bequeathed by the will had on the death under twenty-one and without issue inheritable of the sixth Earl, become the absolute property of the seventh Earl. On appeal to Lord Chancellor *Cairns*, his Lordship, in April, 1868, ordered the bill of the Earl to be amended, so as to set forth the claim of the seventh Earl to the chattels under the residuary clause in the third Earl's will, and on that being done, a decree was, on the 8th of June, 1868, pronounced in favour of the claim of the seventh Earl (1).

This appeal was then brought.

Mr. *Mellish*, Q.C., and Mr. *Jessel*, Q.C. (Mr. *C. Hall* was with them), for the Appellant:—

The trusts here are not executory. The construction put upon this part of the will in the Court below is not in accordance with the authorities, and would defeat the plain intention of the testator. That intention was, that the chattels should accompany the possession of the estates, but the testator knew that this was impossible to the full extent he desired, and so added the words, as "far as the rules of law or equity will permit." It is admitted that those words will not control nor even correct a gift void in itself, but they are to be attended to in considering the intention of the testator. Subject to this restriction he gave the chattels to the person in "actual possession" of the estates under the provisions of the settlement. The condition of actual possession was fulfilled by the sixth Earl. There were several persons who would take the estates by

(1) Law Rep. 3 Ch. App. 564, 574. The decree declared that on the death under twenty-one of the sixth Earl, the chattels and personal estate became subject to the trusts declared by the will of the third Earl of his residuary personal estates, under which the pre-

sent Earl would be tenant in tail male of the lands directed to be purchased, and that having barred the entail in such lands and personal estate he had acquired the absolute interest; see the Order of this House, *post*, p. 109.

purchase, but the sixth Earl was the first tenant in tail who took them by descent. As such, he became absolutely entitled to the chattels: *Scarsdale v. Curzon* (1). Then came a clause of cesser, directing that they should not absolutely vest in any tenant in tail if he should die under twenty-one without leaving issue inheritable. The object and the effect of this clause would be to carry over the chattels to the next possessor of the estates, but that object cannot be attained, for the gift over is beyond the limits which the law allows, and is void: *Dungannon v. Smith* (2), and *Ware v. Polhill* (3). A gift over which is too remote, and therefore void, cannot defeat a vested interest previously given: *Blease v. Burgh* (4); *Ring v. Hardwicke* (5). The consequence is, that the chattels having once validly vested in the sixth Earl, and the gift over after him being illegal and void, the property in the chattels passed to his personal representative.

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The attempt to carry over a gift beyond the limits allowed by the law against perpetuities makes the gift over absolutely void: *Tollemache v. Coventry* (6). A devise is bad unless at the death of the testator it is clear that it must of necessity, not merely that it may, *Cattlin v. Brown* (7), vest in some one "within a life in being and twenty-one years afterwards, and, to speak with perfect correctness, a few months for gestation": *Dungannon v. Smith* (8); *Ibbetson v. Ibbetson* (9). The effect of such an attempt where the object of the trust itself was recognised and enforced, is shewn in *Marshall v. Holloway* (10). In that case there was a devise of real and personal estate on trust to invest while any person beneficially interested in the realty and personalty should be under twenty-one for the purpose of accumulation, and, subject thereto, to the eldest grandson of the testator for life, remainder to his first and other sons in tail, with many similar remainders, and a proviso that such persons as should be entitled to an estate tail in the real estate should not be absolutely entitled to the personal estate before twenty-one. It was held that the eldest grandson took a vested

(1) 1 J. & H. 40, 50, 68.

(2) 12 Cl. & F. 546.

(3) 11 Ves. 257.

(4) 2 Beav. 221, 226.

(5) Id. 352.

(6) 2 Cl. & F. 611; Sug. Law of Property, 330.

(7) 11 Hare, 372, 375.

(8) 12 Cl. & F. 546, 563, 622.

(9) 10 Sim. 495, 515.

(10) 2 Sw. 432, 448.

115c6p AS. 210.

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estate for life, and that the trust for accumulation was void. Lord *Eldon* there treated the trust to accumulate as good, but as good only during the minority of the tenant for life, and as bad beyond that limit, and he would not sever the proviso by considering whether there were any children who might be within the limits. *Scarisbuck v. Skelmersdale* (1) is to the same effect. Here were several tenants for life, but the first tenant in tail by descent was the sixth Earl, in whom the title to the chattels vested at birth: *Foley v. Burnell* (2); and could not afterwards be divested by the proviso, which is a condition subsequent, and which being in itself invalid could have no effect whatever: *Egerton v. Brownlow* (3). The gift to the sixth Earl here took effect by virtue of the original devise, but the seventh Earl can only take by the effect of the proviso, which, for the purpose of carrying over the chattels to him, is bad. The only effect of this proviso would be to accelerate the possession of the next taker, but if that acceleration can only apply to some one who, by the limits created by the law against perpetuities, cannot take at all, the title to the property must remain where the law had before vested it. *Christie v. Gosling* (4), upon which Vice-Chancellor *Malins* relied as governing this case, is distinguishable from it. And so Lord *Cairns* himself thought. There the words were not so strong as they are here, and there was no necessity, as in this case, for the person entitled under the limitations of the realty being in actual possession in order that the chattels might vest in him. Here that is a governing and indispensable qualification. Then, again, Lord *Cairns* thought that there was only a gift to the first taker as tenant in tail in actual possession, but that he took a defeasible interest, and that on the cesser of that interest there was nothing to carry over the chattels to the next taker. That opinion is not justified by the authorities. The trusts include every taker under the series of limitations. The words "person and persons who for the time being," the provision that the "heir-looms" are to go with the realty "for ever," and that "an inventory" is to be made of them by those who hold a temporary possession of them, all shew that the testator looked to a succession of takers, and that the only

(1) 17 Sim. 187.  
 (2) 4 Bro. P. C. (8vo.) 319.

(3) 4 H. L. C. 1. 104  
 (4) Law Rep. 1 H. L. 279.

limit to that succession was to be found in the restriction which the rules of law and equity put upon perpetuities.

It is a mistake, too, to suppose that an express direction that, on the cesser of a particular interest, the chattels shall go over is necessary. In *Christie v. Gosling* (1) there were no express words of gift over; but no doubt was entertained that the proviso of cesser had that effect. On the proviso coming into operation the remainder over, if in itself valid, takes effect immediately without farther provision: *Dickson's Trusts* (2). The forms used by the best conveyancers never contained express words of gift over (3).

(1) 1 De G. J. & S. 1; Law Rep. 1 H. L. 279. *9<sup>th</sup> Ed. MS. 109.*

(2) 1 Sim. (N.S.) 37.

(3) Many different forms were referred to in the course of the argument. Some of them are here given. In the *Shelley Settlement*, dated 1791, drawn by Mr. *Butler* (*Duval's MSS.* vol. i., p. 180), the words are: "Yet so nevertheless that if any of the land so to be purchased as last hereinbefore is mentioned shall be held by lease or leases for years, the same shall not vest in the child or children of any person or persons hereby made tenant or tenants for life of the said manors," &c. Form by Mr. *Coote* (*Duv.* MSS. vol. x, p. 10): "I bequeath all the plate, &c., to go and be held and enjoyed with the same houses respectively, as far as the rules of law and equity will admit, by the person or persons who for the time being shall be entitled to the possession of the same by virtue of this my will. Yet so that the same shall not vest absolutely in the child of any person hereby made tenant for life of the said houses respectively unless such child shall attain the age of twenty-one years. But nevertheless such child, respectively, shall, during her minority, be entitled to the use and benefit of the said furniture and other articles." Mr. *Duval* altered this last sentence in a form which he afterwards drew (*Duv.*

*MSS.* vol. x., p. 283), and used these words: "In any son of any person hereby made tenant for life of the said manors and other hereditaments, unless such son shall attain the age of twenty-one years. But nevertheless any such son who for the time being shall be entitled in possession to the said manors and other hereditaments shall, during his minority, be entitled to the use and possession of the said jewels," &c. A form drawn by Mr. *Brodie* was in these terms: "Shall not vest absolutely in any tenant in tail male who shall be the child of any tenant for life under the said limitations, unless or until such person shall attain the age of twenty-one years." In another form Mr. *Duval* (*MSS.* vol. xii., p. 114), used these words: "All the plate, &c., to go and be held and enjoyed with the said houses respectively, so far as the rules of law and equity will admit, by the person or persons who for the time being shall be entitled to the possession of the same by virtue of this my will; yet so that the same shall not vest absolutely in any child of any person hereby made tenant for life of the said houses respectively unless such child shall attain the age of twenty-one years. But nevertheless such child respectively shall, during his minority, be entitled to the use and benefit of the said furniture, &c." In *Rebow's Settlement*

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There was nothing but a provision for cesser in the case of *The Duke of Newcastle v. The Countess of Lincoln* (1), and the Court so construed the covenant there, and so executed the settlement to be made under it (2).

If the gift vested in the sixth Earl could not be divested in favour of the seventh Earl because such carrying over would be beyond the limits allowed by law, neither could the gift be divested in order to form part of the residue of the testator's estate. Such a mode of disposing of it had never before been thought of. And so to dispose of it is to assume an intestacy as to these chattels. Now no one can look at the will and believe that the testator ever intended these chattels to go as upon an intestacy. He thought he had provided that they should accompany the possession of the estates as long as the rules of law and equity would permit. The words "heir-looms" prove what character he intended to

(*Duv. MSS.* vol. xviii., p. 148), the form is, upon such trusts as shall, as far as "the nature of the premises and the rules of law and equity will allow, correspond" with the declarations in the settlement, "yet so that the same shall not, as to the effect or purpose of transmission, vest absolutely in any person hereby made tenant in tail male or in tail by purchase of the undivided parts," &c., "unless such person shall attain the age of twenty-one years." In another form (*Duv. MSS.* vol. xviii. p. 370), there is a gift to trustees of a trust to "permit and suffer the said trust to be possessed and enjoyed" by the Earl of A. "during his life, and after his decease by such person as shall from time to time hold and enjoy the title and dignity of Earl of A., it being my will," &c., that the trust, &c., &c., shall "go and be held in the way of heir-looms, with the title and dignity of Earl of A., so far as the rules of law and equity will permit: provided always, that the said trust, &c., shall not, for the purpose of transmission, vest absolutely in any person succeed-

ing to the said title and dignity of Earl of A. who shall be the son of any person living at my decease, and shall not attain the age of twenty-one years."

In another form drawn by Mr. *Hodgson*, settled by Mr. *Duval* and Mr. *Sugden*, and finally adopted by the Court of Chancery, the property was given upon such trusts as related to the freehold manors to "go along and be enjoyed with the estates of inheritance so far as the rules of law and equity and the different tenures of the estates would admit of, yet so that the same should not, for the effect or purpose of transmission, vest absolutely in any child or children of the said therein intended marriage, being tenant or tenants in tail male, or in tail general," under the limitations of the intended settlement "unless or until such child or children should attain the age of twenty-one years, or depart this life under that age, leaving issue inheritable," &c. In no one of these forms did there appear to be any express words of gift over,

(1) 3 Ves. 387.

(2) 12 Ves. 218.

impress on these chattels, and how it was his settled purpose to avoid an intestacy. The whole will shews that the testator intended that the chattels should be held for life only, till they got to a tenant in tail of the estates, and then they were to vest in that tenant in tail. The description of "heir-loom" is most important, as establishing what was the intention of the testator: *Trafford v. Trafford* (1). But for these words the first tenant for life would have taken them absolutely; but it was the intention of the testator that they should go with the estates, so long as the rules of law or equity would permit. The words of the will mean that the person who first takes the inheritance of the real estate shall take the chattels as heir-loom. The proviso which follows is no doubt a cutting-down clause; but though it operates as a cesser of an existing interest, and though the intention of the testator probably was that the next tenant of the estate should, if the law would allow him, take these chattels with the estate, he was aware of the difficulty on that point, and appended the words "so far as the rules of law and equity will permit." Those rules do not permit the chattels to go over to the seventh Earl, and they, therefore, remain where the will had vested them, in the sixth Earl, and pass to his representative.

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Sir *R. Palmer*, Q.C., Sir *J. Karlake*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Walford*, for the Respondent, were not called on, but the case was adjourned.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, the question on these appeals was argued before your Lordships in the course of last session, when, without calling on the Respondents to argue their case, your Lordships took time to consider it.

The case arises on the will of *Charles*, third Earl of *Harrington*:—
 [His Lordship stated the general nature of the will.] Thus were named in successive order those who afterwards became Earls, until you arrive at the sixth Earl, who was the issue of the person previously in possession as tenant for life (namely, the fifth Earl), and was himself the first tenant in tail.

(1) 3 Atk. 347.

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That being the character of the instrument, the clause in the will which has given rise to this discussion is in these words:— [His Lordship read it (see *ante*, p. 88), and he also stated the succession to the title and estates down to their present possessor, the seventh Earl (see *ante*, p. 89).] The sixth Earl did not live to attain twenty-one, and the question then arose as to what became of the chattels under the limitations contained in the will.

The contest was this: The present Appellant, the Dowager Countess of *Harrington*, the mother of the sixth Earl, as his administratrix, filed her bill claiming the furniture and chattels so bequeathed by the third Earl as having become the property of the sixth Earl, notwithstanding his not having attained the age of twenty-one. The seventh Earl also filed a bill claiming the furniture and chattels under the trusts declared of them by the will.

The case took a different direction under the original decision of Vice-Chancellor *Malins*, from that which it took under the decision of the then Lord Chancellor Lord *Cairns*, by whose decree the decision of Vice-Chancellor *Malins* was modified.

Originally, when the case was before Vice-Chancellor *Malins*, no notice whatever had been taken of the residuary gift which was contained in the will of the third Earl of *Harrington*, and to which I must now call your Lordships' attention. That residuary bequest gave all his personal estate to the same trustees upon trust to convert the same into money, and after payment of his debts and other moneys to lay out the surplus in the purchase of real estate, "to be settled to the same uses as the mansion-house of *Elvaston* and the other estates."

The consequence of that was, that the property became vested in the purchase of estates to those uses, and in that shape, on the death of the sixth Earl, devolved upon the seventh Earl, who executed a disentailing deed of the property, and by that means had become absolute master of the whole of the residuary estate. So that in either of two events he would be entitled—namely, if those chattels were not well disposed of by the will, or if they could be and were carried by the gift over on the death of the sixth Earl, under twenty-one years of age. In the first case he, as residuary legatee, would be entitled in the events which had happened, he having become owner of the residue, and acquired the absolute ownership of the

estates which were settled to the same uses as those in the deed which barred the entail. In the second case he would be entitled, if the limitations in the will were good, to carry over the chattels (in the event of the sixth Earl dying without having attained the age of twenty-one, and without having issue inheritable) to him, the seventh Earl, as the person then in possession of the estates. In either character he would be equally entitled to those chattels.

He had therefore a twofold right in them, which right can only be displaced by the construction which was pressed on us by the counsel for the present Appellant with reference to the will as regards the sixth Earl, and his position under the estate tail as coming into the ownership of the chattels on the death of the fifth Earl.

The construction of the will pressed on us by the Appellant is this:—She says that the limitation carries the chattels to the sixth Earl, but that the proviso which is engrafted upon that limitation is a proviso in defeasance of the interest which is so vested in the sixth Earl, and that defeating as it does, or affecting to defeat, the interest of him and of every successive owner in the event of that owner dying under twenty-one years of age, this proviso aims at the effect of preventing any final disposition of the chattels until there shall be some tenant in tail in possession who shall attain the age of twenty-one. The Appellant contends that that event may not occur for centuries by reason of a series of deaths, under twenty-one, of successive tenants in tail who may have married, and therefore may be in the position of leaving others as infants who would claim under the same bequest, and be subject to be divested in the same manner. The Appellant consequently contends that finding a provision which in itself is good to vest the estate, and a proviso to defeat it which is void, from aiming at perpetuity, the proviso is of no effect, and the estate vested cannot be divested. She therefore insists that the vesting clause cannot be prevented from having its full and complete effect, as intended by the will, except by a breach of the settled rule of law which forbids perpetuities of limitation either of personal or real estate, and she says that the limitation itself being good, and the proviso void, the sixth Earl remains in possession of the property which he has so acquired, and that she, the present Appellant, as his

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personal representative, is entitled to it. It is only in that way that the present Appellant can claim any interest in these chattels.

Now, my Lords, I quite agree with the Appellant that that case which was referred to, namely, the case of *Christie v. Gosling* (1), is not one which can have any application to the present. In that case there was a series of limitations, by will, of real estate to successive tenants for life, with remainder to the first and other sons in tail. Then there was a bequest something like that which we have in the present instance, but not precisely in the words here contained, which, by the effect of a subsequent limitation by reference to previous estates, was held by your Lordships' House to mean a limitation only affecting those who took under the limitations in the will, as tenants in tail by purchase. So that, of course, all question as to the limits of perpetuity being transcended was entirely removed. The different tenants in tail who took by purchase would be persons all coming into *esse* within the well-known limits assigned—a life in being and twenty-one years afterwards. And therefore no question could arise as to the proviso exceeding the proper limits. But this will, which refers not to anything contained in the will itself, but to an old settlement of a long anterior date (more than twenty years before the will itself), and to the limitations which might be created by that settlement, and which speaks of giving chattels, not to those persons who took simply as tenants in tail by purchase, but to persons who for the time being should be persons taking by descent through the operations of the estates tail given to persons under the settlement, is a will of a very different character from the will in *Christie v. Gosling* (1); and therefore that case has no application to the present case. But then we have to ascertain what is the intent of the instrument as now expressed, namely, that these chattels are to go to the persons taking for the time being under the limitation of the settlement, but so as that the property shall not vest in any person so taking if that person does not attain the specified age or fulfil the specified condition. I apprehend, as Lord *St. Leonards* said in *Christie v. Gosling* (1) (where he differed from the rest of the noble and learned Lords who decided that case as

to the construction of the will generally), that there could be no doubt whatever that the condition was annexed to the gift. It was not annexed by way of proviso cutting down the gift, but was an essential part of the gift itself, so that no person could claim the gift except as a gift to him in the event of his being the person who ultimately could claim to hold the gift by fulfilling all the qualifications to which the gift itself was attached. I apprehend, therefore, that a person who took the estate, and did not attain the age of twenty-one, had not fulfilled the conditions of the gift, and cannot claim in any way to retain the gift; nor can any persons who derive their title through him make out any claim to that gift, as being a gift absolutely vested in him, subject only to be defeated by the proviso.

I take it, therefore, that the claim of the Appellant entirely fails; and the only question that remains is this, whether this proviso has the effect of carrying that estate on to those who come next in remainder—so exposing itself, as it was contended by the Appellant, to be rendered void as aiming at perpetuity, in which event the farther carrying on of the estate would be contrary to the rules of law, and there would be a simple intestacy; or whether it does carry it on to the person next in remainder, subject to the controlling effect of those words, which are also to be found in this will, that the property is to go as an heir-loom with the estate so long as the rules of law or equity will permit.

Now, my Lords, a great deal of argument was employed before us upon the effect of those words, and as to how far those words could or could not control the effect of a limitation which might seem otherwise to err against the rule with respect to perpetuity—how far, in other words, the Court would apply those words so as to give to the limitations an effect consonant with the rule of law, and arrest and defeat the rule of defeasance by keeping the limitations within the limits which the law would allow. If this rule could be construed in that way, then the Respondent, the seventh Earl, would be entitled, by virtue of having fulfilled all the conditions, as a person actually in existence within the prescribed limits, namely, a life in being and twenty-one years after the death of the testator, to claim the property absolutely given to him by the will in that character. In the other event there would

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be an intestacy, and the property would fall into the residuary gift. Now, it so happens in this case that in either event the seventh Earl is clearly entitled to the property. If it falls into the residue, then he takes it as such by virtue of his being the last residuary legatee. If it goes over in the manner I have referred to, then he takes it by virtue of the limitation, he being himself the person standing within the prescribed limits. The difficulty upon that part of the case is simply this, that you cannot look on a bequest of this kind as an executory bequest, and take upon yourself to model the gift so as, by virtue of a modelling of the will, to give it full effect and validity. You cannot model it, but you must deal with it as you find it existing in the will. And the question is, whether these words, "so far as the rules of law or equity will permit," by themselves, by virtue of the phraseology of the limitation, imply that the will is to be read as if the testator had used that as a short expression to indicate the exact period to which he wished to confine the limitation, namely, to confine it to vesting within the ordinary prescribed limits. Upon that question there has been at times some conflict of opinion as to how far these words in themselves are words which will enable you to interpret the will in a sense such as to give to the whole operation of the bequest the effect which no one can doubt would be the purport and meaning of the testator in his will. I am not aware that there is upon this point any series of decided authorities of a contrary character, but I am aware that there has been some difference of opinion upon the subject; and it appears to me that in this particular case, in which we are called upon to lay down a rule of construction which will have effect not only upon this will, but upon other wills also, not only for the future (with respect to which, I think, we should adopt a rule of construction, which would be very useful), but also wills which are past, or which are now in existence, and which are not before us for present consideration, I think it would, on the whole, be more prudent not to do more than the necessity of this case requires, namely, to vary the decree of the Court below so as to express that which is the fact, that, under all the circumstances of this case, the Appellant being clearly entitled to no interest in these chattels, and the Respondent being clearly entitled to them under either the one

title or the other, we ought so far to modify the decree as to shew that it is simply on that account that we affirm the judgment in favour of the Respondent. We do so without making any farther or other declaration than that of the want of title on the part of the Appellant, and the absolute and complete title on the part of the Respondent in one way or the other. The Appellant has, in fact, completely failed in making any substantial case before your Lordships. The Order made by your Lordships should express that the variation which I have referred to should be made in the original decree, and there should be no costs of this appeal, the necessity for which, and for the whole litigation in this matter, having been occasioned by the somewhat obscure and imperfect expressions contained in the will.

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LORD WESTBURY :—

The gift of the heir-looms, the property in question in this suit, is contained in the following words :—[His Lordship stated them.]

Let us first consider the effect of these words.

It is settled (though much to be regretted) that they do not create an executory trust.

The words are words of direct and complete gift, and the gift consists in the direction that the possession and enjoyment of the personal chattels shall accompany the settled real estates through all the changes of ownership that may occur during the time allowed by law for postponing the absolute vesting of personal property ; that is, during a life or lives in being at the time of the gift and for twenty-one years afterwards. The words therefore amount to a declaration by implication of such trusts of the personalty as correspond with the ownership of the real estate, and secure its being held and transmitted with the real estate up to the limit of time allowed by the law against perpetuities.

In the construction of gifts of this nature it has been settled that when, and so soon as, the principal trust estates, to which the personal chattels are thus made accessory, vest in a tenant in tail in possession the transmissibility of the personal estate ceases, although the time allowed by the rule against perpetuities has not expired, and the personal chattels become the absolute property of



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such tenant in tail in possession, although he may be an infant, and may afterwards die without having attained majority. On such an event the ownership of the personal chattels would be disjoined and severed from the settled real estates; and the effect of the direction that they should accompany the estates during all the time allowed by the rule against perpetuity would be *pro tanto* defeated. To meet this difficulty it has been usual to annex to the direction that the heir-looms shall go along with the settled real estates, a condition that the heir-looms shall not vest absolutely in any tenant in tail unless such tenant in tail shall attain the age of twenty-one years, or, dying under that age, shall leave issue inheritable under the settlement. Such a proviso occurs in the present will; and the event having happened of the death of the tenant in tail under twenty-one, who at the time of his death was tenant in tail in possession of the settled estates, and as such entitled to the enjoyment of the heir-looms, the question arises, whether such heir-looms are transmitted on to the next succeeding tenant in tail, or belong to the personal representative of the infant tenant in tail so dying, or are undisposed of, and fall into the residue of the testator's personal estate.

The matter appears to be clear on principle.

The event of the death of the infant tenant in tail has happened within the period of time allowed by the rule against perpetuities, and therefore the direction that the heir-looms shall accompany the settled estates remains *pro tanto* unexhausted and in full force; and this direction takes up the chattels as soon as they are divested of the ownership of the infant tenant in tail, and carries them on to the next tenant under the limitations of the settled estates.

Thus, a clause of transmission is found in the original direction or gift. Inasmuch as the term during which that direction was to continue has not expired at the death of the infant tenant in tail, and the estate of the infant tenant in tail being determined by force of the condition, the heir-looms are remitted to, and fall back again under the direction to accompany the settled estates.

The argument chiefly urged by the Appellant was, that the proviso or condition divesting the estate of the infant tenant in tail in the heir-looms on his death during infancy, was void as being too remote. But, in my judgment, that is not so; for, according

to the true construction of the proviso, it operates only on the interest of a tenant in tail becoming entitled during the time that the heir-looms are directed to go along with the settled estates, that is, during the period allowed by the rule against perpetuities and whilst the heir-looms continue to be transmissible; and I am of opinion, therefore, that the case of the Appellant has entirely failed.

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In the events which have happened it is not necessary to decide the question as between the tenant in tail and the residuary legatee; nor is there any appeal by the former as tenant in tail; and therefore I think the order may be limited to dismissing the appeal, but, under the circumstances, I think, without costs.

LORD COLONSAY:—

My Lords, I will only say with respect to this case that the difficulty that pressed on my mind is obviated by the judgment which has been suggested by my noble and learned friend on the woolsack.

LORD CAIRNS:—

My Lords, whatever may be the proper construction of the gift of the chattels in the will of *Charles Earl of Harrington*, the case is not one which seems to me to fall within the principle of, or to be governed by, the decision in *Christie v. Gosling* in this House (1). In that case real estate was settled on sons of the testator for life, and grandsons in tail male; and chattels were given to be held upon such trusts and for such estates and interests as were declared concerning the real estate, or as near thereto as the rules of law and equity would permit, but not to vest absolutely in a tenant in tail unless he should attain twenty-one. The Lord Chancellor first, and this House afterwards upon appeal, held—on the construction of these words—that the chattels were given, and the words prohibiting absolute vesting applied, to those tenants in tail only who took by purchase. And when once this construction was arrived at, all difficulty was at an end, and the bequest was in no way obnoxious to the law or rule against perpetuity.

In the case now before the House there is a settlement of real

(1) Law Rep. 1 H. L. 279.

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estates on successive tenants for life and tenants in tail; but the trust of the chattels is not (as in *Christie v. Gosling*) for those tenants for life and tenants in tail, but for the persons to whom the actual possession of the estates may accrue under the settlement, so far as the rules of law and equity may permit, with a prohibition against vesting in a tenant in tail dying under twenty-one; and the question is, to what extent and through what lives is this qualification or condition of "possession" to carry us on in our search for an absolute owner of the chattels.

The trust of the chattels is contained in a sentence of which the first clause may be termed the dispositive part; and the second, commencing with the words, "but so, nevertheless," is a clause of qualification or defeasance, engrafted on, and intended to modify or reduce, what would otherwise be the wider effect of the dispositive part; and it may, in my opinion, be laid down as a safe rule of construction in such a case, that whatever be the legal range and ambit of the dispositive clause, the effect of the clause of modification or defeasance must be confined to the inside of that range and ambit. The clause of disposition may be wider than the clause of modification engrafted upon it, but the clause of modification cannot be wider than the clause of disposition. The accessory must not be larger in its scope or operation than the principal. The clause of modification or defeasance may be too large or extensive in its operation, and may thus bring itself within the rule against perpetuities; but if so it is difficult, if not impossible, to escape from the conclusion that the clause of disposition must itself have been too extensive, and therefore obnoxious to the same rule.

I will read the bequest, omitting all superfluous words, and omitting for the present the reference to heir-looms and to the rules of law and equity:—"I give to my trustees my chattels in my mansion-house in trust for the person or persons who, for the time being, shall, under the limitations in the settlement of my mansion-house and estates be in the actual possession of the mansion-house and estates; but so nevertheless that the chattels shall not vest absolutely in any person who may become entitled to the mansion-house and estates for an estate of inheritance, unless he attain twenty-one, or leave issue," &c.

Reading the bequest in this way, and omitting, as I have done, the words "so far as the rules of law and equity will permit," it would be difficult to avoid applying to it the principles acted upon by this House in *Lord Dungannon v. Smith* (1). There, Lord *Dungannon* gave his leasehold estates to trustees in trust to permit such person as for the time being would take by descent as heir male of the body of his grandson *Arthur*, to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same to such person.

There is little, if any, difference between a trust for enjoyment by a series of unborn persons in succession until some one of the series shall attain twenty-one, an event which may not occur for a century, and a trust for enjoyment by the same persons in succession with a prohibition against the property vesting unless some person shall attain twenty-one.

In the case of *Dungannon v. Smith* this House held the whole bequest to be void on the score of remoteness, and refused the appeal of the eldest son of the grandson *Arthur*, even although he had attained twenty-one. The Lord Chancellor (Lord *Lyndhurst*), in moving the judgment of the House, spoke thus (2): "The disposition of these leasehold premises, of the *corpus*, was to be to a person answering two descriptions. He was to be heir male of the body taking by descent from *Arthur Trevor*, the grandson, and he was to be of the age of twenty-one years. It is quite obvious that those two circumstances might not combine for many generations, and, indeed, it is possible that they might never combine. It is obvious, therefore, that this disposition of the property is void for remoteness; for, as everybody knows, property of this description must vest, if at all, within a life or lives in being, and twenty-one years afterwards; and, to speak with perfect correctness, a few months for gestation. It is wholly immaterial in this case that there was a person twenty-one years of age answering the description at the time; that is, to make use of a phrase of a noble and learned Lord in the case of *Tollemache v. Earl of Coventry* (3) that was a pure accident; it might or might not have happened. Unless it is absolutely certain that the event must happen within

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(1) 12 Cl. & F. 546.

(2) 12 Cl. & F. 622.

(3) 2 Cl. & F. 611.

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the period prescribed, it is quite clear that the rule of remoteness applies to the case, and the devise becomes altogether void.” “But, my Lords, it is supposed that this gift of the *corpus* of the estate is operated upon in some degree by the disposition of the intermediate rents and profits. The disposition of the intermediate rents and profits is to the person who for the time being should take by descent as heir male of the body of the grandson, until some such person shall have attained the age of twenty-one years. Now the disposition of the *corpus* of the estate is to a party answering two descriptions or qualities. The intermediate rents and profits are taken by a person or persons who answer one of these descriptions. It appears to me that the dispositions can exist entirely unconnected with each other, that they have no necessary relation to each other, and that the disposition of the rents and profits to particular individuals under this will no more affects the disposition of the *corpus* of the estate than if that disposition had been to mere strangers.”

If, therefore, the bequest in the present case were to be read as a trust for every person in succession to whom the possession of the estates might open, with a prohibition against the chattels vesting unless some tenant in tail attains twenty-one; a trust, therefore, destined to continue until some one did attain twenty-one, the whole bequest would, in my opinion, be void, as in *Lord Dunganon v. Smith* (1), and the chattels would thus fall into the residue, and go to the Respondent and not the Appellant.

The Appellant, however, deprecates this construction, and seeks to avoid it by insisting that under the dispositive clause there was a trust for the sixth Earl of *Harrington*, who was in possession of the estates, and was the first tenant in tail to whom the possession accrued; and farther, that the clause of modification or defeasance is a clause applying to all tenants in tail *in perpetuum*, and being wholly invalid, cannot operate as against the sixth Earl dying under twenty-one.

I will assume, for a moment, such a construction to be possible, on the words of this bequest, as I have stated it. But the construction would be arrived at only by splitting up the general words of the dispositive clause, and treating it as a trust for each

(1) 12 Cl. & F. 546.

person named in the settlement, if he come into possession; that is to say for *A.* (tenant for life), if he come into possession, remainder for *B.* (tenant in tail), if he come into possession, and so on. But if the cumulative words of the dispositive clause can thus be divided, and effect given to one part, though not to other parts of the disposition, I cannot see why the Appellant would not have, on the same principle, to submit to a similar treatment of the clause of defeasance, which would then be read as a clause applying itself to the estate of each person coming into possession and taking under the dispositive clause, and valid therefore as to some estates, though invalid as to others.

But I am of opinion that there is no sound principle on which the generality of the trust, “for the persons who shall for the time being be in the actual possession of the estates” can be explained and limited, except by the limit to be derived from the words which I have hitherto purposely omitted, “to the end and intent that the [chattels] may be considered as heir-looms, to go along and for ever be used and enjoyed with the same mansion-house and estates, so far as the rules of law and equity will permit.”

Lord *Hardwicke* was of opinion, in the cases of *Gower v. Grosvenor* (1) and *Trafford v. Trafford* (2), that words of this kind made a trust of chattels an executory trust and not a direct gift; and that a Court of Equity might execute the trust according to the general intent of the testator, and, even without any direction to that effect, carry over the chattels, within certain limits, on a tenant in tail dying under twenty-one. These decisions are commented on, and the subsequent decisions to the contrary collected, by Lord *Cottenham* in *Rowland v. Morgan* (3), who regretted, as many others have done, that Lord *Hardwicke's* views had not been followed. None, however, of the authorities opposed to Lord *Hardwicke's* opinion has doubted, indeed all have assumed, that a general trust of chattels to go with settled estates, or to be held by persons for the time being entitled to the possession of settled estates, as long as the rules of law and equity would permit, would be effectual, and effectual by reason of those particular words, to

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(1) 5 Madd. 337.

(2) 3 Atk. 347.

(3) 2 Ph. 764.

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carry the chattels to the first person with an estate of inheritance. And the doctrine of the same authorities, that the Court of Equity could not farther protect the chattels if that person died under twenty-one, would of course be irrelevant to the present case, if there is here a valid gift over on death under twenty-one.

I come then, without hesitation, to the conclusion that what I have termed the dispositive clause in the will of *Charles Earl of Harrington* carries the chattels as heir-looms to the sixth Earl; but I am also of opinion that the clause of defeasance prevented the chattels vesting in the sixth Earl, dying as he did under twenty-one. I give to the second clause the effect of making it operative on the disposition which is validly created by the first clause, an operation consonant to the introductory words of the second clause, viz., "But so nevertheless." Whether this is the whole operation of the two clauses, or whether the combined effect of the two clauses is to carry over the chattels to the present Earl as next in possession, is immaterial either to the Respondent or Appellant; and now that the whole title of the Respondent has been stated on the record, it may, perhaps, be sufficient and more expedient to declare that, in the events which have happened, the present Earl is entitled to the chattels. If it were necessary, however, to decide under what title the Respondent takes the chattels, I should probably prefer the title declared by the decree as it stands. But I think it, at the same time, a legitimate construction to read the clause of defeasance as inserted in the dispositive clause before the words "to the end, &c.," thus:

I give my chattels in trust for the persons for the time being
in actual possession of the estates :

So that, nevertheless, they shall not vest in any one entitled
to the estates for an estate of inheritance unless he
attain twenty-one, &c. :

To the end that the chattels may be heir-looms and go with
the estates, so far as the rules of law and equity will
permit.

This would be simply marshalling the clauses of the sentence in their logical sequence, and would divest and carry over the chattels within legal limits.

I think that in every view of the case the Appellant fails, and that the appeal must be dismissed.

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The following Order was afterwards entered on the Journals:—

It is Ordered and Adjudged, by the Lords spiritual and temporal, in Parliament assembled, that the appeal be, and the same is hereby dismissed this House: And it appearing to this House that, in the events which have happened, and having regard to the title of the Plaintiff, *Charles Wyndham* seventh Earl of *Harrington*, as tenant in tail male in the actual possession of the mansion-house and estates at *Elvaston*, in the county of *Derby*, settled by the indenture of the 20th of July, 1804, and also as absolutely entitled to the residuary estate of *Charles* third Earl of *Harrington*, it is unnecessary to decide under which title the Plaintiff, *Charles Wyndham* seventh Earl of *Harrington*, has become entitled to the heir-looms and funds in the decree mentioned: It is therefore farther Ordered and Adjudged, That the said decree of the Court of Chancery, dated the 8th of June, 1868, complained of in the said appeal, be varied, and as varied shall be as follows, viz.:—

“It is therefore this present day, that is to say, Monday, the 8th day of June, 1868, by the Right Honourable *Hugh MacCalmont* Baron *Cairns* of *Garmoyle*, in the county of *Antrim*, Lord High Chancellor of *Great Britain*, and by the High and Honourable Court of Chancery, and the power and authority thereof, Ordered and Adjudged, That the said decree be varied, and as varied be as follows: It is Ordered and Adjudged, That the Plaintiff’s bill in the first-mentioned cause (1) do stand dismissed out of this Court; And it is Adjudged and Declared, That in consequence of the death, under twenty-one, of *Seymour Sydney Hyde* sixth Earl of *Harrington*, the Plaintiff, *Charles Wyndham*, the present Earl of *Harrington*, has become and is now absolutely entitled to all the plate, linen, china, glass, pictures, prints, drawings, household goods, and household furniture, and books mentioned and described in and given by the will of the said *Charles* third Earl of *Harrington* as heir-looms, and is also absolutely entitled to the Bank £3 per Cent. Annuities and cash (if any) remaining on the credit

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of the cause, "*The Earl of Harrington v. The Countess of Harrington*," "*Heir-loom Dilapidations Account*," subject to the payment thereof of the costs of the Duke of *Bedford*, Baron *Foley*, *Charles Romilly*, and *George Russell*, Defendants in these causes, to be taxed by the Taxing Master as between solicitor and client, including therein any charges and expenses properly incurred by them as trustees: And the said *Charles Wyndham* Earl of *Harrington* is to be at liberty to apply for the transfer and payment of the said Bank Annuities and cash; but such application is not to be made without notice to the said Defendants the Duke of *Bedford*, Baron *Foley*, *Charles Romilly*, and *George Russell*: And it is Ordered and Adjudged, That the above-named *Elizabeth William* Countess of *Harrington* do, within seven days after service of this Order, deliver up to the above-named *Charles Wyndham* Earl of *Harrington* all such of the said chattels hereinbefore referred to as by her said answer in the second above-mentioned suit are stated to have been at *Harrington House*, in *Kensington Palace Gardens*, therein mentioned, at the time of the decease of *Seymour Sydney Hyde* sixth Earl of *Harrington*: And it is Ordered and Adjudged, That the costs of all parties of this appeal to the Lord Chancellor be taxed by the Taxing Master, and be paid by the said *Charles Wyndham* Earl of *Harrington*, &c.

Lords' Journals, 27th March, 1871.

Solicitors for the Appellant: *Gregory, Rowcliffes, & Rawle*.
 Solicitor for the Respondent: *H. Walford*.

THE PROPRIETORS, &c., OF THE CORK } APPELLANTS;
AND YOUGHALL RAILWAY . . . }

AND

RICHARD HARNETT AND ANOTHER . . . RESPONDENTS.

1871
April 24.

Railway—Certificates—Summary Petition—Chancery.

The 14 & 15 Vict. c. 70 (the *Railways Act, Ireland, 1851*), applies to every railway in *Ireland*. It makes provision for ascertaining the compensation to be awarded to any landowners whose lands are taken under any private Railway Act, and requires (s. 14) that certificates of the amount of compensation awarded by the arbitrator shall be delivered by the company to the person entitled, and payable on demand (s. 15). The 21st section enacts, that where the company shall not deliver the certificate "to any person claiming to be entitled to any interest in any lands the possession whereof has been taken by the company," the right to have such certificate may be enforced by application to the Court of Chancery in *Ireland*, "in a summary way by petition;" and it then goes on to enact that "all other rights and interests of any party arising under the provisions of this Act may be in like manner enforced against the company by such application as aforesaid."

A. was the owner of land required by a railway company; notice of an intention to take his land under the compulsory powers of its Act (private and local, into which the *Lands Clauses Act, 1845*, and the *Railways Act, 1851*, were to be taken as incorporated) was given. The valuer under the *Railways Act 1851 (Ir.)* was appointed, and made his final award, which was not however delivered till a few days after the compulsory power to take the land under the local Act had expired. Abstracts of title, &c., were afterwards demanded by and supplied to the company, which, however, never entered into possession of the land. Before the time for the construction of the railway had expired, the landowner formally demanded the company's certificate of the amount awarded. This was never given. He then presented to the Court of Chancery in *Ireland* a petition praying that the company might be ordered to lodge the amount in the *Bank of Ireland* :—

Held, that under the 21st section of the Act of 1851 the Court had power to grant this petition.

THIS was an appeal against a decision of the Court of Appeal of Chancery in *Ireland*, which had reversed a previous decision of the Master of the Rolls (1).

The Appellants, under several local Acts, were authorized to construct a railway from *Cork* to *Youghall*, and after the passing of the

(1) 16 Ir. Ch. Rep. (N.S.) 268. The there given. The case in the Court of judgment of the Master of the Rolls is Appeal is not reported.

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19 & 20 Vict. c. xxxiii. (with which the *Lands Clauses Act*, 1845, and the *Irish Railways Act*, 1851, were incorporated), desired to make a branch railway into *Cork*, and gave notice to parties now represented by the Respondents that they required certain lands of those parties for that purpose. The property required was valued under the provisions of the *Irish Railways Act*, 1851, and the value of it, after discussion, settled and declared. Mr. *Fishbourne*, the arbitrator appointed under this public Act, made his final award, dated the 5th of July, 1859, by which he awarded to the Respondents two sums, one of £4441, and the other of £1077, as the price or compensation for the lands required by the Appellants. This award was duly lodged with the clerk of the peace on the 18th of July, 1859. The compulsory power to take the land expired on the 23rd of the preceding month (June, 1859). In December, 1861, the solicitors of the Respondents were applied to for an abstract of the title to these lands, which was furnished, and on the 28th of January, 1862, an application was made for a copy of a will relating to the lands, which was also furnished. No farther step was taken by the Appellants in the matter, and they never, in fact, entered into possession of the lands. Their powers to execute the works authorized by their Act of 1856 expired on the 1st of July, 1863. On the 10th of December, 1864, a letter of complaint was addressed to the secretary of the company on account of the delay which had occurred in settling the matter, and asking for a certificate, under the provisions of the Act, for the sum which had been awarded. On the 12th of December the secretary answered that he would submit the letter to the directors at their next board meeting. On the 21st of the same month another letter, pressing for a certificate, was sent to the secretary, who answered that the board had not met, and that the seal of the company could not be affixed except at a board. Nothing was done, and on the 21st of January, 1865, a notice was served on the secretary requiring the Appellants to lodge the two sums in question in the *Bank of Ireland* according to the provisions of the *Railways Act, Ireland*, 1851, and the *Lands Clauses Consolidation Act*, 1845. Nothing was done upon this notice, and on the 7th of February, 1865, the Respondents presented a petition to the Lord Chancellor of *Ireland* (the Right Hon. *Maziere Brady*), praying that the

money (with interest) might be ordered to be lodged in the *Bank of Ireland*, in accordance with the provisions of the *Irish Railways Act*, 1851, above mentioned. A notice of motion was given, and the motion came on to be heard before the Master of the Rolls on the 7th and 13th of June and the 4th of December, 1865, when the Master of the Rolls declined to make any order on the petition, leaving it to the parties to proceed in the ordinary manner at law or in equity. His Honour, in substance, observed, that there was no provision in the *Irish Railways Act*, 1851, authorizing the company on summary petition to order the sum awarded to be paid into the *Bank of Ireland*, but the 14th section directed the company to deliver to the person entitled to the lands a certificate, under the company's seal, stating the amount to which he was entitled under the award, and that payment of the amount specified in the certificate might be enforced in the way mentioned in the 15th section. Here no certificate had been given. By the 21st section, if the company did not deliver such certificate to the person entitled to the lands "the possession whereof has been taken by the company as aforesaid," the right to have the certificate according to the provisions of the Act might, at the costs of the company, be enforced by application to the Court of Chancery in *Ireland*, in a summary way by petition. Here the company had never taken possession, no certificate had been given, and he did not think the Court had jurisdiction to order the money itself to be lodged as required. He was of that opinion notwithstanding the words of the 21st section of 14 & 15 Vict. c. 70 (1).

The decision of the Master of the Rolls was carried by appeal before the Lord Chancellor *Blackburne* and the Lord Justice of Appeal *Brewster*, who reversed it.

(1) That section is in the following terms: "If, from any reason whatever, the company shall not deliver the certificate aforesaid to any party claiming to be entitled to any interest in any lands the possession whereof has been taken by the company as aforesaid, then the right to have a certificate according to the provisions of this Act may, at the costs and charges of the company, be enforced by any party or parties, by

application to the High Court of Chancery in *Ireland*, in a summary way by petition, and all other rights and interests of any party or parties arising under the provisions of this Act may be, in like manner, enforced against the company by such application as aforesaid." The Court of Appeal had applied the latter provisions of the section to this case.

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This appeal was then brought.

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Mr. *Pearson*, Q.C., and Mr. *F. Waller*, for the Appellants:—

The decision of the Master of the Rolls was correct; that of the Court of Appeal is erroneous. There is no jurisdiction in the Court now to compel payment by the summary way of petition. The Appellants had never come under an obligation to purchase these lands, and at this moment they could not be treated as the owners of the lands. Mere notice to take did not constitute such an obligation, nor confer on them that character. The Legislature never could have intended that it should do so, and here the compulsory powers to take the lands, and the power to use them in constructing the railway, have long since expired. The company is at this moment under liquidation; and under such circumstances as exist here the Court will not compel the specific performance (and this suit really amounts to a suit for specific performance) of a contract if any such had been made. But in truth there has been no contract, though if there had been, the circumstances are such as to shew that it would be inequitable now to decree its performance. *Webb v. London and Portsmouth Railway Company* (1). The Respondents, if they mean to insist upon there being an actual contract, ought to have taken active steps in the matter long before. By their delay in attempting to enforce what they now wish to represent as a contract, they have quite disentitled themselves to any relief from the Court. The provisions of the *Lands Clauses Act*, 1845, are entirely inapplicable to this case; and the words of the 21st section of the *Irish Railways Act*, 1851, only grant the power of summary interference to compel the giving of a certificate, not the payment of money. *Hedges v. Metropolitan Railway Company* (2), *Baker v. Metropolitan Railway Company* (3), *Eastern Counties Railway Company v. Hawkes* (4), *Munroe v. Newry and Warrenpoint Railway Company* (5), and *Stuart v. London and North Western Railway Company* (6), were referred to and commented on.

Sir *R. Palmer*, Q.C., Mr. *George A. C. May*, Q.C. (of the Irish Bar), and Mr. *Marten*, for the Respondents, were not called on.

(1) 9 Hare, 129; 1 De G. M. & G. 521.

(4) 5 H. L. C. 331, 376.

(2) 28 Beav. 109. *9 June 1875.*

(5) 2 Ir. Ch. Cas. 263.

(3) 31 Beav. 504-509. *9 June 1875.*

(6) 1 De G. M. & G. 721.

LORD WESTBURY:—

The state of things here is this. Everything that was required to be done by the vendors was done by them anterior to the 10th of December, 1864. They were then in a condition to have received, and ought to have received, the money. They applied for a certificate to get the money, and the Appellants, on one pretence or another, withheld the certificate and have kept the money ever since in their pockets. And because they have done so they say now that they ought to be relieved from the contract altogether. The order made by the Court of Appeal was properly made.

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THE LORD CHANCELLOR (Lord *Hatherley*):—

The whole thing was complete before the constructing powers had expired. The Appellants asked, in 1862, for a bill; it was conceded to them, and the constructing powers under it did not expire till the 1st of July, 1863. The whole contract was complete at the time that these powers were in full force.

LORD CAIRNS:—

The Respondents, in 1862, supplied the only documents that were wanted to make up the title to these lands; that was long before the Appellants' powers to use them had expired; it was for the Appellants to take possession, and nothing remained but to pay the money. The Respondents did not ask for it for two years or more, but the Appellants were liable to pay it. The Respondents were invested with the full and complete rights of vendors as against the Appellants, and it is no answer to their present claim to say that they did not exercise those rights as early as they might. These were "rights and interests arising under the provisions" of the *Railways Act* of 1851, which the Court of Chancery had the power to enforce.

Order complained of affirmed, and appeal dismissed with costs.

Lords' Journals, 24th April, 1870.

Solicitors for Appellants: *Stevens, Wilkinson, & Harries.*

Solicitors for Respondents: *Thomas & Hollams.*

1871

JOHN SHEPHERD PLAINTIFF IN ERROR ;

April 27, 28.

AND

THOMAS AND HENRY HARRISON . DEFENDANTS IN ERROR.

Transfer of Property—Invoice—Bill of Lading.

In taking a bill of lading, the vendor of the goods who ships them controls the possession of the captain, and makes him accountable to deliver the cargo according to its terms. It is the symbol of property, and the holder of it retains the property in himself. It is not inconsistent with a statement in the invoice that the goods are "shipped on account and at the risk" of the consignee. The *jus disponendi* is still reserved to the shipper through the medium of the bill of lading.

The burden of shewing the existence of a different state of things lies on the person who contradicts what would be the ordinary legal conclusion from the transaction.

Where a bill of lading, and a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to a vendee of the goods, it is a well understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained.

Where the bill of exchange is not accepted, but the bill of lading is retained, the bill of lading, acquired in that manner, gives no right of property to the person so acquiring it.

S., who was in good credit with *P. & N.*, at *Brazil*, desired them to purchase cotton for him. Their agent in *England* was *G. P.* They did purchase the cotton, and sent it, the invoice describing it as shipped on account and at the risk of *S.* The invoice and two bills of lading were enclosed in a letter to *G. P.*, who forwarded the invoice and one of the bills of lading, together with a bill of exchange for the price of the cotton, to *S.* in a letter in which they said: "We enclose bill of lading, &c., shipped by *P. & N.* on your account. We hand also the draft on your good selves for costs of the cotton, to which we beg your protection." *S.* wrote an answer, making some complaints about the quality and price of the cotton, and after referring to some previous transaction, said that these circumstances stood in the way of his accepting the bill. He handed over the bill of lading to his brokers, who paid the freight, and obtained from the shipowners a delivery order; but before the cotton was actually delivered to the brokers of *S.*, *G. P.* interposed, and on the authority of a duplicate bill of lading obtained delivery of the cotton:—

Held, that the property in the cotton had not, under these circumstances, passed to *S.*, but remained with *P. & N.*, whose agent was lawfully justified in taking possession of the cotton.

THIS was a proceeding in Error on a judgment of the Court of Exchequer Chamber, which had confirmed a previous judgment

of the Court of Queen's Bench (1). The cause was tried before Mr. Justice *Mellor*, at *Manchester*, in 1868, and a verdict was taken for the Plaintiff, subject to a Case.

The Plaintiff was a merchant carrying on business at *Manchester* under the style of *John Shepherd & Co.* The Defendants were the owners of the screw steamer *Olinda*, of *Liverpool*. There had been other dealings between the Plaintiff and *Paton, Nash, & Co.*, of *Pernambuco*, and on those dealings there was a credit of £3000 in favour of the Plaintiff. The first dealing of the Plaintiff with *Paton, Nash, & Co.* in the article of cotton appeared to have taken place in 1865. On that occasion the Plaintiff received from *George Paton & Co.*, of *Liverpool*, who were the agents in this country for *Paton, Nash, & Co.*, of *Pernambuco*, a letter dated the 3rd of May, 1865, in which they said: "Herewith we beg to hand you bill of lading 240 bags cotton, per *Spray*. We presume our *Pernambuco* friends have made a mistake in sending it under cover to us. We also enclose draft on your good selves for £2072 9s. 6d., which we will thank you to return with the needful." The bill was returned accepted, and in due time paid. There seemed to have been another order for cotton in 1865, which, on account of the state of the markets, was not executed; but in the course of the correspondence *Paton, Nash, & Co.* wrote, on the 14th of May, 1866: "You do not mention how we are to reimburse ourselves—whether we are to discount sales, or to draw on you." On the 7th of September, 1867, the Plaintiff sent to *Paton, Nash, & Co.* a letter desiring them to purchase for him 1000 bales of cotton at a price specially mentioned. *Paton & Co.* on the 28th of September, wrote back acknowledging the order, and adding: "You do not mention whether part of the order is to go against your funds lying here, but we suppose you intend it as a remittance." To which, on the 25th of October, 1867, the Plaintiff answered: "Pray don't make the mistake you did before about our funds in your hands; they never were intended to be applied to cotton purchases, but to wait instructions." *Paton, Nash, & Co.* proceeded to execute the order, and purchased 750 bales of cotton, sending 339 by the ship *Capella* and 208 by the ship *La Plata*. On sending this cotton *Paton & Co.* despatched a letter, dated the 25th of October, 1867,

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(1) Law Rep. 4 Q. B. 196-493.

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which ended with these words: "On reading over your order again, we are impressed that you wish us to draw for the amount of invoice, and not to deduct net proceeds in our hands, and we therefore shall value on you on forwarding bills lading." In another letter of the same date they wrote to say that they had sent the cotton, "and beg now to enclose invoices 339 bales, per *Capella*, costing £1616 8s. 8d.; 208 bales per *La Plata*, £883 7s. 1d. We have drawn upon you as per note at foot for the same, to which we beg your protection." Two drafts were enclosed, which were drawn in favour of *George Paton & Co.*, of *Liverpool*. The letter ended thus: "The bills lading will be handed over to you by Messrs. *George Paton & Co.*" The invoice accompanying this cotton described it as shipped "per Norwegian brig *Capella* for *Liverpool*, on account and risk of Messrs. *John Shepherd & Co.*" There was a similar invoice as to the cotton shipped per *La Plata*.

The bills of lading, together with the two bills of exchange, were forwarded by *Paton, Nash, & Co.* to *George Paton & Co.*, and on the 16th of November *George Paton & Co.* wrote to the Plaintiff: "We beg to hand you herewith bills of lading for 339 bales of cotton per *Capella*, and 208 bales of cotton per *La Plata*, received this morning from our *Pernambuco* friends. We also enclose bills on your good selves for £1616 8s. 8d. and £883 7s. 1d., to which please do the needful, and return to us in course." These bills were accepted, and returned to *George Paton & Co.* in a letter in which the Plaintiff complained that some of the cottons had not been bought according to his instructions, and added: "In case, therefore, of any loss arising from the sale of these, we must claim against you." Some correspondence, not in a friendly tone, occurred between the Plaintiff and *George Paton & Co.* on the subject of these cottons. The remaining 200 bales purchased by *Paton, Nash, & Co.* were shipped by them on board the *Olinda*. On the 12th of November, 1867, *Paton, Nash, & Co.* wrote a letter to the Plaintiff, in which they said: "Enclosed please find invoice and bill lading of 200 bales cotton, shipped per *Olinda* S.S., costing £861 2s. 7d., which we hope may prove correct and satisfactory. We have advanced the brig *Capella* £55 6s. 6d., as per receipt enclosed, to be deducted from the freight on your cotton, and

on which you have 5% commission, and insurance £2 15s. 4d., to cover the advance. We have therefore drawn upon you for £916 9s. 1d. in favour of Messrs. *George Paton & Co.*, to which beg your protection." The letter and invoice were forwarded direct to the Plaintiff. The bill of lading and the bill of exchange were forwarded to *George Paton & Co.*, who sent them to the Plaintiff. The invoice referred to in this letter was "Invoice of 200 bales cotton shipped per *Olinda*, S.S., for *Liverpool*, on account and risk of Messrs. *John Shepherd & Co.*" The bill of lading was in the usual form, and was thus indorsed:—

" *Pernco.*, 13 Novr., 1867, per pro
Paton, Nash, & Co.,
A. M. C. Soares.
Geo. Paton & Co."

The *Olinda* arrived at *Liverpool* on the 5th of December, and on that day *George Paton & Co.* wrote to the Plaintiff: "Our *Pernambuco* letters to the 12th ult. are just to hand, and we beg to enclose B/ lading for 200 bales cotton shipped by Messrs. *Paton, Nash, & Co.*, per *Olinda*, S.S., on your account. We hand also their draft on your good selves for costs of the cotton, to which we beg your protection (£916 9s. 1d.)." On the 6th of December, 1867, the Plaintiff answered: "Your favour of yesterday is received, with inclosures. On reference to invoices and bills of exchange which we have accepted, we find that they have been drawn in excess of price mentioned in order; there is also a quantity styled 'Mediums' that we did not order at all. These, with the hostile position you have taken with regard to the 208 bales ex *La Plata*, stand in the way of our accepting the bill of exchange now enclosed. We shall place the 200 bales ex *Olinda* in another broker's hands, and soon as we learn we shall inform you their opinion of them." The Plaintiff retained the bill of lading, and sent back the bill of exchange unaccepted, whereupon it was protested by *George Paton & Co.* The Plaintiff sent the bill of lading to his brokers, with instructions to pay the freight and obtain the cotton. The brokers went to the Defendants and paid the freight, and obtained a delivery order; but the delivery was stopped by the intervention of *George Paton & Co.*, who held

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the duplicate bill of lading, and who undertook to indemnify the Defendants.

The Court was to have the same power as a jury to draw any inferences of fact.

The Court of Queen's Bench gave judgment for the Defendants, and this judgment was affirmed in the Exchequer Chamber. The Plaintiff thereupon brought Error.

Sir *R. Palmer*, Q.C., and Mr. *T. H. Jordan*, for the Plaintiff in Error:—

The facts here shew that the Plaintiff was entitled to this cotton, and the law is in accordance with the facts. The sending of an invoice and a bill of lading to a consignee vests in him the property in the goods, subject only to be divested by the consignor's right to stop the goods *in transitu*, in case of the consignee's insolvency: *Walley v. Montgomery* (1). So absolutely was the property there considered to be vested in the consignee, that the consignor's agent having under another bill of lading obtained possession of the cargo, it was held that an action of trover was maintainable against him, without even a tender of the payment of the freight being made to him or to the captain. The right here was complete, not only by the shipping on board "on account and risk" of the Plaintiff, as declared both by the letters and the invoices, but also by the transmission to the Plaintiff of the bill of lading itself. There was no feeling of misgiving as to payment, no idea of any necessity to stop *in transitu*, for the house at *Pernambuco* had in hand ample funds belonging to the Plaintiff, and consequently when the invoices were sent, there could be no doubt of the intention to make the Plaintiff the absolute owner of the cotton. The acceptance of the bill of exchange was not a condition precedent to the Plaintiff's right to the possession of the cotton. *Coxe v. Harden* (2) is perhaps a still stronger authority for asserting that on the shipment of goods on account and at the risk of the consignee, the title to the goods vests absolutely in him. [LORD CAIRNS:—There the consignee was in actual possession of the

(1) 3 East, 585.

(2) 4 East, 211.

goods, by the captain having delivered them to him.] Lord *Ellenborough* there said (1): "The goods were originally purchased for *Oddy & Co.* by their order, and shipped for their use and at their risk, they were therefore entitled to the possession of them as soon as they arrived, the shippers not having stopped them *in transitu*;" and Mr. Justice *Grose* said: "They were originally ordered to be shipped by *Oddy & Co.*, under whom the Defendants claim; they were according shipped on account of *Oddy & Co.* and at their risk: that vested the property in them by law, subject only to the shippers stopping the goods *in transitu*." The Lord Chief Baron in this case quoting that passage, and acknowledging its weight as an abstract proposition of law, tried to get rid of it by applying it subject to the particular circumstances of this case. But the circumstances here do not justify such application. The possession of large funds on the credit side of the Plaintiff's account renders it impossible to believe that there was any notion of treating him as a customer whose solvency was doubted. In *Gurney v. Behrend* (2) Lord *Campbell* said: "We cannot doubt that, subject to the right of stopping *in transitu* the property vested in the vendee when the cargo had been loaded at *Dantzic*, and the indorsed bill of lading had been sent off to *Collman & Stotterfold*." In *Wilmshurst v. Bowker* (3) a quantity of wheat was sold, to be paid for by a banker's draft on *London* at two months, to be remitted by the vendee on receipt of the invoice and bill of lading. The vendee received the invoice and bill of lading, but did not remit the banker's draft, and the vendor tried to stop the delivery of the wheat. It was there held by the Exchequer Chamber that by the delivery of the wheat on board a vessel for the account and at the risk of the vendee, and by the transmission of the bill of lading by the vendor, the latter had parted with his property and right of possession, and could not stop the wheat *in transitu*, on failure of the vendee to remit the banker's draft. *Key v. Cotesworth* (4), under similar circumstances, decided that the property in goods vested absolutely in the vendees upon the delivery of the goods on board the ship and the

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(1) 4 East, 217.

(2) 3 El. & Bl. 622, 623. 18

(3) 7 Man. & G. 882; 8 Sc. N. R.

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(4) 7 Exch. 595.

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transmission of the bill of lading, and the acceptance of a bill of exchange was treated as not amounting to a condition precedent. *Brandt v. Bowlby* (1) was relied on in the Court below, but does not seem an authority here, for the circumstances there were very peculiar, and the person in whom the property of the wheat would have vested, had not only sent to cancel his order before the shipment was made, but had afterwards confirmed that cancellation: his own conduct, as Lord *Tenterden's* judgment shews, precluded him from setting up what would otherwise have been an absolute title. *Wait v. Baker* (2) does not affect the present case, for not only was the bill of lading made out in the usual form to the shipper's order, but the vendee at one time refused to receive the bill of lading, asserting that the cargo was inferior to sample, and on that refusal the bill of lading was indorsed to the Plaintiffs.

[LORD CAIRNS:—Do not the circumstances here shew that the the vendors reserved their control over the property?]

They do not; they contradict that idea. The letter about the money of the Plaintiff in the hands of *Paton & Co.*, the forms of the invoices, the notice enclosed "please find invoice and bill of lading," the transmission of the bill of lading of this very cotton itself, the letter of *George Paton & Co.* in 1865, in which they say that the transmission to them, and not to the Plaintiff, of the bill of lading was a mistake, and a letter in which they suggest to the Plaintiff that he should insure, all shew an intention at once to vest in the Plaintiff the title to the property, and that it had vested in him. In *Joyce v. Swann* (3) it was held that there may be a complete contract so as to pass the goods from the seller to the buyer, although the price has not been definitely agreed on between them. Where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller and remaining unindorsed will not prevent its passing. Upon this principle it was that in *Browne v. Hare* (4) the vendee was treated as having the

(1) 2 B. & Ad. 932.

(2) 2 Ex. 1.

(3) 17 C. B. (N.S.) 84.

(4) 3 H. & N. 484; 4 Ibid. 822.

property in a quantity of rape oil vested in him, and was held liable to pay for it after it had been wholly lost at sea.

Mr. *Holker*, Q.C., and Mr. *Gully*, for the Defendants in Error, were not called on.

At the conclusion of the argument on behalf of the Plaintiff in Error their Lordships delivered judgment as follows:—

LORD CHELMSFORD:—

My Lords, your Lordships, I believe, consider it unnecessary to hear any argument on the part of the Defendants. The question for you to determine is, whether the Defendants, the owners of the vessel *Olinda*, were bound to deliver to the Plaintiff 200 bales of cotton which were shipped by *Paton, Nash, & Co.*, from *Pernambuco*, and invoiced “on account and at the risk” of the Plaintiff, and whether they are liable to an action for the non-delivery. The question is one entirely of fact, depending upon the circumstances stated in the special case, and upon inferences which the Courts below were at liberty to draw from those facts:— [His Lordship stated them, and he referred particularly to this letter in which it was said: “On reading over your order again we are impressed that you wish us to draw for the amount of invoice, and not to deduct net proceeds in our hands, and we therefore shall value on you on forwarding bills of lading.”]

That, therefore, was the course of dealing which thenceforth was to take place between the parties with regard to consignments made by *Paton, Nash, & Co.*, on the orders of Mr. *Shepherd*. Accordingly, after the cotton was purchased by *Paton, Nash, & Co.*, parts of it were sent in two vessels called the *Capella* and *La Plata*, and the other part in the *Olinda*, on which the present question arises.

Now, when the cotton was shipped on board the *Capella* and the *La Plata*, bills of lading were sent (and this is a most important circumstance), not to Mr. *Shepherd*, but to the agents of *Paton, Nash, & Co.*, Messrs. *George Paton & Co.*, of *Liverpool*, and the letter of the 25th of October announcing that says: “The bills lading will be handed over to you by Messrs. *George Paton & Co.*”

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Accordingly, *George Paton & Co.* sent the bills of lading to the Plaintiff, and also inclosed the bills for acceptance in a letter of the 16th of November, in which they say: "We beg to hand you herewith bills of lading for 339 bales cotton, per *Capella*, and 208 bales cotton, per *La Plata*, received this morning from our *Pernambuco* friends. We also enclose bills on your good selves for £1616 8s. 8d. and £883 7s. 1d., to which please do the needful and return to us in course."

Did Mr. *Shepherd*, the Plaintiff, then believe that he would not be entitled to receive the cotton upon these bills of lading so sent to him, without his accepting the bills of exchange? Why, what does he say in his letter? He says: "Your favour of the 16th instant is to hand, bringing two bills for acceptance, which as desired we now return accepted, but with the reservation as to the mediums and seconds not being bought according to our instructions." And then he makes an apology for not having sent the bills of exchange immediately, for he says: "Your letter did not arrive on Saturday till after offices were closed, say 1 P.M."

It appears to me that this is very important indeed, as shewing the nature of the transactions between the parties, to consider what was done with regard to a portion of this order; and that the bills of lading were sent to the agents of *Paton, Nash, & Co.*, and not to the Plaintiff, apparently preserving to *Paton, Nash, & Co.*, the *jus disponendi* over these goods, and not passing the actual absolute property in them to the Plaintiff.

Then, with regard to the 200 bales of cotton in question, the course of proceeding appears to have been this:—They were shipped on board the Defendant's vessel the *Olinda*; and a letter of the 12th of November was written, on which stress has been laid with regard to one passage which it contains: "Enclosed please find invoice and bill of lading of 200 bales cotton shipped per *Olinda*." Hence it is said that there was evidently the intention, originally at all events, to send the bill of lading to the Plaintiff, and not to the agents of *Paton, Nash, & Co.* But I confess it appears to me that the former dealings with regard to the other parcels of cotton sent by the *Capella* and the *La Plata*, transmitting the bills of lading upon those occasions to the agents of *Paton, Nash, & Co.*, and not to the Plaintiff, very strongly

lead me to the conclusion that it was a mistake to say that they intended to enclose the bill of lading. Probably when they came to look at the letter they said: "Oh, this will not do; we don't intend to send the bill of lading to the Plaintiff," and therefore they altered the destination of it, by sending it to their agents instead of to the Plaintiff.

Then the agents, *George Paton & Co.*, write on the 5th of December to the Plaintiff: "Our *Pernambuco* letters to 12th ult. are just to hand, and we beg to enclose B./ lading for 200 bales cotton shipped by Messrs. *Paton, Nash, & Co.*, per *Olinda* S.S., on your account. We hand also their draft on your good selves for costs of the cotton, to which we beg your protection." Now, what must Mr. *Shepherd* have understood, having regard to previous dealings with respect to the other portions of the cotton? what must he have understood by this letter of *George Paton & Co.*, the agents, but this, that he was not to deal with the bill of lading unless he accepted the bill of exchange which was sent at the same time? I think there can be no doubt whatever that that would be the fair and proper impression made by this letter on his mind, having regard to previous transactions.

In answer to that, he writes to them: "On reference to invoices and bills of exchange which we have accepted, we find that they have been drawn in excess of price mentioned in order; there is also a quality styled 'mediums' that we did not order at all. These, with the hostile position you have taken with regard to the 208 bales ex *La Plata*, stand in the way of our accepting the bill of exchange now inclosed. We shall place the 200 bales ex *Olinda* in another broker's hands, and as soon as we learn we shall inform you their opinion of them." Well, he did so. He sent back their bill of exchange unaccepted, and then placed the bill of lading in his own brokers' hands, Messrs. *Eason, Barry, & Co.*

It has been said that upon that bill of lading, if the Plaintiff's agent had acted promptly, he might and would have received, and would have been entitled to receive, the cotton ex the *Olinda*. What would have been the consequence of that it is unnecessary for us to say. Under these circumstances, if it is clear that he was not entitled to use the bill of lading without accepting the bills of exchange, it is possible that an action of trover might

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have been brought against him had he got possession of the cotton, and that the damages would have been the amount of the bills of exchange which he was bound to accept. But it is unnecessary for us to consider that question. Before any use had been made of the bill of lading *George Paton & Co.* interfered; they produced their bill of lading, and demanded possession of the goods under an indemnity, and the goods were given up to them.

The question, then, is, whether, under these circumstances, the Plaintiff was entitled to the possession of the goods. The question with regard to the property may perhaps be a different question; but the question now is, whether he was entitled to have the possession of the goods on the production of the bill of lading, and whether the Defendants are liable to an action of trover for refusing to deliver the cotton to him, and for delivering it to *George Paton & Co.*

Now that being, as I have already said, a question of fact, and of inference to be derived from the circumstances stated in the special case, we have had the opinion of two Courts,—I should say the unanimous opinion, notwithstanding some slight doubt intimated by Baron *Cleasby*,—of nine Judges on the subject, that the Plaintiff under the circumstances, was not entitled to the possession of the cotton.

But it is said on the part of the Plaintiff that the inference of fact is only to be drawn with reference to decisions which have been made with regard to documents which pass the property in goods; and we have been referred to cases to shew that where goods are shipped on account of and at the risk of a consignee the absolute property in the goods vests in him, subject only to a right on the part of the consignor to stop *in transitu*. Some strong cases have been cited on that subject, and particularly two before Lord *Ellenborough* (*Walley v. Montgomery* (1), and *Coxe v. Harden* (2)). In the case of *Coxe v. Harden* the consignee had obtained possession of the goods, which, Lord *Ellenborough* said (2), removed the difficulty which stood in the way of the consignees, namely, the circumstance of the captain having signed the bills of lading in such terms as did not entitle them to call upon him for a delivery under their bill of lading, which was unindorsed;

(1) 3 East, 585.

(2) 4 East, 211, 217.

shewing, therefore, that upon a shipment with an invoice on account and at the request of the consignee, the consignor may impose conditions on the delivery of the possession.

Now, that this is always a question of intention appears to me to be decided by the case of *Moakes v. Nicolson* (1). In that case coals were sold at *Hull*, and shipped on board a vessel chartered by the buyer. If that had been a case of delivery of goods to a carrier by land, of course they would have vested in the buyer. The coals were to be paid for in cash. One of three bills of lading making the coals deliverable to *Pope*, the buyer, or order, was sent to him with an account of the price of the coals. He not having paid the amount, the agent of the seller gave notice to the master of the vessel not to deliver the coals, and he accordingly refused. An action was brought by the person to whom *Pope*, the buyer, had sold the coals, and had handed the bill of lading. It was held that he was not entitled to recover. Chief Justice *Erle* said: "The property could not pass out of *Josse* (the seller) unless there was a sale by him with the intention that the property should pass to the vendee. Now, it was clearly the intention of *Josse*—and the jury have so found—to retain the property until his agent in *London* should receive the cash against the bill of lading. If that was the clear intention of *Josse* the property did not pass."

My Lords, in a book to which my noble and learned friend near me (Lord *Cairns*) has referred me, and which appears to be very ably written, on the sale of personal property (2), the authorities on the subject of reservation of the *jus disponendi* are all collected, and the whole matter is summed up clearly and distinctly in the following passage: "The following seem to be the principles established by the foregoing authorities: first, where goods are delivered by the vendor, in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee; secondly, where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is

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(1) 19 C. B. (N.S.) 290.

of Sale of Personal Property," book ii.

(2) Benjamin's "Treatise on the Law c. 6, p. 288.

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not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading as the one for whom they are to be carried. This principle runs through all the cases and is clearly enunciated by Baron *Parke* and by Mr. Justice *Byles* in two cases to which reference is there made (1).

Under these circumstances I apprehend your Lordships can entertain no doubt whatever that the Judges of the Court of Queen's Bench and the Judges of the Court of Exchequer Chamber came to a right conclusion upon the facts which were before them, and that the Plaintiff was not entitled to recover in this action against the Defendants for the non-delivery to him of the cotton in question. I therefore advise your Lordships that the judgment of the Court below should be affirmed.

LORD WESTBURY:—

Out of respect for the elaborate argument that we have heard I shall say a very few words, though they are probably unnecessary. I take the law to be perfectly clear, and I think the inferences that ought to be derived from the facts in this case are also clear. The house at *Pernambuco* accepted a commission and agency to buy cotton on behalf of *Shepherd & Co.*, the present Appellants. They did so, and they paid for that cotton out of their own money. It was expressly agreed that funds which they happened to be in possession of, belonging to *Shepherd & Co.*, should be altogether separated from the transaction, and should not be resorted to for the purposes of the cotton purchase. They shipped the cotton on board the *Olinda*—I am speaking of the 200 bales—and when they delivered the cotton to the captain of the *Olinda*, they took from him the ordinary bill of lading to their own order.

Now, what was the effect of that transaction in law and according to mercantile usage? The effect was this—that they controlled the possession of the captain, and made the captain accountable to deliver the cotton to the holder of the bill of lading. The bill of lading was the symbol of property, and by taking the bill of lading they kept to themselves the right of dealing with the property shipped on board the vessel. They also kept to themselves the

(1) *Wait v. Baker*, 2 Ex. 1; *Moukes v. Nicolson*, 19 C. B. (N. S.) 290; 34 L. J. (C. P.) 273.

right of demanding possession from the captain. They had, therefore, all the incidents of property vested in themselves. Now, that was by no means inconsistent with the special terms of the shipment, namely, that the cotton was shipped on account of and at the risk of the buyers. That is perfectly consistent with the property, as evidenced by the bill of lading, remaining in the possession of the vendors of the cotton in question.

Then, if that be so, it is incumbent on the buyer to adduce circumstances to control the legal effect of that transaction, and to shew that the evidence of ownership and of the right to deal with the property consequent on the authority of the bill of lading, are controlled by other facts, and that it was not intended to retain the right of possession, and the interest in the property shipped, and the right of disposing of it, in the holder of the bill of lading. Undoubtedly the obligation to shew this lies upon the individual who contradicts what would otherwise be the ordinary legal conclusion from that transaction.

Well, then, what are the circumstances which are relied on for that purpose? First of all, our attention is directed to the letter of the 12th of November, in which it appears that by an accidental slip of the pen—not corrected, I admit—the bill of lading is spoken of as accompanying the invoice which the letter covers. Certainly that was not the course of dealing between the parties; for in no case had the bill of lading been sent by the vendors of the cotton to *Shepherd*, the buyer; but on all former occasions the bills of lading had been sent to the agent of the vendor. Messrs. *Shepherd* had, therefore, no right whatever to infer, from past experience, that it was the intention of the parties to send them the bill of lading, which, in reality, the letter did not cover, or that they were bound, by having used that expression, to send to them the bill of lading. It was a mere accidental mistake, which ought not to affect at all the legal conclusion to be derived from the transaction.

Then we come to another inquiry which is most important, which is this—with what intent, and what reasonable expectation, and for what purpose, were the bill of lading and the bill of exchange sent to the present Plaintiff by the *Liverpool* house, *Paton & Co.*, who were the agents of the house in *Pernambuco*? Now I think no man, certainly no lawyer, would consider that the letter was

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written with any other conviction in the mind of the writer than this, that it would not be consistent with courtesy towards a house like that of *Shepherd & Co.* to say: "Remember, you are not to possess yourselves of the bill of lading until you have accepted the bill of exchange." That is not said in terms, but it is indicated by the transaction. And I have no doubt that there is not an honourable man of business in *Liverpool* that would have hesitated even for a moment to derive that conclusion from the language of the letter, and that if he did not choose to accept the bill of exchange he would have sent back both the bill of lading and the bill of exchange. The facts are plain, and I cannot but hold that that was the inference which the *Liverpool* house intended should be drawn from their sending the two documents together—namely, to intimate their expectation that the one would not be retained, namely, the bill of lading, unless the bill of exchange should be accepted. Unfortunately, it appears from another letter that there has been some slight misunderstanding or ill-will between the parties, and accordingly the course is adopted of sending back the bill of exchange unaccepted and retaining the bill of lading. I think the retention of the bill of lading (without intending to convey the slightest imputation on the character of other parties) was contrary to what you may call the truth and honour of the case. I think the truth of the case was this, that the two documents were originally intended to be dependent the one on the other, and that they were sent together under the conviction and in the confidence that the bill of exchange would be accepted and returned to the sender in consideration of the bill of lading. That, however, was not done, and therefore I take it that the bill of lading acquired in that manner gave no right of property to the present Appellant, and that the judgment of the Court below was therefore correct, and ought to be affirmed.

LORD COLONSAY:—

My Lords, it appears to me on consideration of the case stated and the authorities we have heard, that the question comes in the present case to this, *quo animo* were the bill of lading and the bill of exchange sent by the *Pernambuco* house to their agents in *Liverpool*, and by them sent to *Shepherd*? I think, looking to the

circumstances in which the parties were placed, looking to the manner in which the previous bills of lading and bills of exchange in regard to the other parcels of cotton were dealt with, the plain meaning and intention of the parties was this—that the bill of lading should be retained only if the bill of exchange were accepted, and therefore it was incumbent on the Plaintiff here, if he meant to refuse the acceptance of the bill of exchange, to return also the bill of lading. That being so, I am clearly of opinion that the judgment of the Court below was correct.

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LORD CAIRNS:—

My Lords, this is an action founded on a right of property, and in order to succeed the Plaintiff in the action must shew that, at some period or another, the property in this cotton passed to him. Now, the first question necessary to ask in this case is: When did the property pass to the Plaintiff? It must have been either at *Pernambuco* by what was done there, or at *Liverpool* by what was done there. Did it pass to the Plaintiff by what was done at *Pernambuco*? There was an order given to the house at *Pernambuco* to buy and ship cotton. Two portions of the cotton were shipped in the *Capella* and the *La Plata*, and a third portion in the *Olinda*. In the invoice the goods are described as being shipped on account and at the risk of the Plaintiff. But along with the invoice a bill of lading was taken from the captain making the cotton deliverable, not to the Plaintiff, but to the shipper on board. It is perfectly well settled that, in that state of things, the entry upon the invoice stating the goods to be shipped on account and at the risk of the consignee is not conclusive, but may be overruled by the circumstance of the *jus disponendi* being reserved by the shipper through the medium of the bill of lading.

In this particular case, if I am to judge by what is done at *Pernambuco*, I own I have not the slightest doubt. I see that upon the two previous occasions, when the cotton was shipped by the *Capella* and the *La Plata*, the bills of lading were taken in the same form as in the present case, and those bills of lading were immediately transmitted to *Liverpool* along with the bills of exchange which were to be accepted against the cotton; and the present Plaintiff, at the same time that he was advised of the

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shipment, was also informed that the bills of lading and the bills of exchange had been transmitted together to the agent of the shipper in *Liverpool*. I do not believe there is a merchant in *England* that would have had any doubt that the meaning of that was: You shall have the bill of lading when you accept the bill of exchange. In the present case the only difference was, that in the letter advising the shipments there was a statement, in the first instance, that the bill of lading of the cotton shipped in the *Olinda* was sent directly to the persons to whom the letter was written, namely, the Plaintiff. That has been very much relied on in the argument on behalf of the Plaintiff; but it appears to me to make, not for but against, the Plaintiff, because in point of fact the bill of lading was not enclosed in the letter; and I cannot account for the fact that it was not enclosed, except on this theory, that when the letter came to be closed, those who were closing it took notice that if the bill of lading was enclosed they would lose control over the property; and that therefore they must not do that which, in the first instance, either carelessly or forgetfully, they had stated they would do, but that they must send the bill of lading to their agent in *Liverpool*, as they had done with the former bills of lading. Because if that had not been the case the mode of remedying the omission to enclose the bill of lading would have been to write another letter, stating that they had forgotten to enclose the bill of lading, as they said they would do, and that they now enclosed it. Therefore, looking at what was done at *Pernambuco*, it appears to me that the shippers of the cotton remained masters of the property, and that there was no change of property whatever made by what was done there.

Then, was there any change of property made by what was done in *Liverpool*? Before answering that question we must remember that the position of things is this, that when the cotton arrived at *Liverpool* the property continued in the shippers by virtue of what was done in *Pernambuco*. Was that state of things changed by what was done in *Liverpool*? It is important to remember the position of a mercantile house receiving a bill of lading and a bill of exchange drawn against the cargo for the purpose of obtaining the acceptance of the bill of exchange by the party upon whom it is drawn. I hold it to be perfectly clear that when a cargo comes

in this way, protected by a bill of lading and a bill of exchange, it is the duty of those to whom the bill of lading and the bill of exchange are transmitted in a letter, either "to approbate or to reprobate" entirely and completely, then and there. If they accept the cargo and the bill of lading, and accept the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange in return for the cargo; they discount or use it as they think proper; and they are virtually paid for the goods. But if, on the other hand, the persons to whom the bill of lading is sent do not refuse *in toto* the consignment of the goods, but keep the bill of lading, but do not accept the bill of exchange, then the agents of the foreign shippers have neither the goods nor the money to deal with; if they had repudiated the transaction *in toto* the agents of the shippers might have dealt with some other house and raised money on the goods. I, therefore, think that when one merchant in this country sends to another, under circumstances like the present, a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in enclosing these bills of lading and bills of exchange is, that before you use the bills of lading you shall accept the bills of exchange. Merchants know perfectly well what they mean when they express themselves, not in the language of lawyers, but in the language of courteous mercantile communication; and I do not think that any merchant in *England* receiving a bill of lading and a bill of exchange under these circumstances, when he came to reflect on the matter, would feel any doubt that he could not retain the one without accepting the other. If there was any point in controversy not going to the repudiation of the shipment, the course to be taken is perfectly well known; and it is a course which was taken by these Plaintiffs upon a former occasion, namely, to say: We accept the bill of lading, and we are willing to accept the bill of exchange; but we tell you that in accepting the bill of exchange we assert our right to quarrel with some particular figure in the account which has led to the making of this bill of exchange. I say this, without desiring to suggest that, in this particular case, in the course taken by the Plaintiff, he was actuated by any motive which ought to bring discredit upon him. I believe that he

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conceived that he was right in the course he took ; but in my opinion he was not. I think the conclusion come to in the Courts below was perfectly right. I believe that what was done in *Pernambuco* did not vest the property in the Plaintiff, and that what took place in *Liverpool* did not vest the property in him, but that the property remained in the shippers ; and the action, therefore, in my opinion, ought to fail.

Judgment of the Court of Exchequer Chamber affirmed.

Lords' Journals, 28th April, 1871.

Attorneys for the Plaintiff in Error : *Johnson & Weatheralls*.
Attorneys for the Defendants in Error : *Chester & Urquhart*.

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April 27 ;
May 1.
—

JAMES LIDDY APPELLANT ;
AND
JAMES KENNEDY AND VICTOR COATES }
KENNEDY } RESPONDENTS.

Lease—Condition—Limitation—Entry—Notice—23 & 24 Vict. c. 154.

2029 493.

In February, 1863, *J. K.* made a lease of land to *L.* The land demised really amounted in quantity to, and was described in the lease as containing, 5A. 2R. 20P., and the rent was fixed at £100 a year. The lease contained a clause declaring that it should be lawful “for *J. K.*, upon giving to *L.*, his executors, &c., or leaving at their usual or last known places of abode, three months’ previous notice in writing of an intention to resume, for building purposes, the possession of any portion of the premises demised, to enter into such possession.” It was agreed that “the portion or quantity of the ground so taken shall be valued at the rate of £20 per statute acre, and that the rent hereby reserved shall be proportionably reduced.” *J. K.*, in November, 1864, executed a deed by which he constituted himself and *V. K.*, his brother, tenants in common of the land. In October, 1865, a notice signed by both *J. K.* and *V. K.* was served on *L.*, declaring, in the words of the lease, their intention to resume, for building purposes, possession of the whole of the premises :—

Held, that they were entitled to do so ; that the clause respecting the proportionate diminution of the rent did not restrict them to the exact amount of five acres ; that the deed of 1864 did not destroy the right of entry reserved by the lease ; that the two brothers were, under the 23 & 24 Vict.

c. 154, s. 1, "the landlord" entitled to the possession; and that the notice signed by *J. K.*, whether taken as given for himself alone, or as given by him for himself and his brother, was perfectly good.

The ejectment here was consequential on the notice, and not upon any breach of covenant, and the right of re-entry arising upon the expiration of the notice, there was no necessity for an actual entry in order to maintain the ejectment.

The tenant's right to compensation did not, by the terms of the lease, arise till the landlord had obtained possession of the land.

The notice was served by a messenger at the house of *L.*, who was then absent from home, but the notice was taken in by a woman who appeared to live there, who said that *L.* was then absent but would be back in a few days, when she promised to give him the notice. No explanation of its contents or object was given to her:—

Held, that, under the words of the lease, this service of the notice was sufficient.

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THIS was an appeal under the *Common Law Procedure Act (Ir.)*, 1856, against a judgment of the Court of Exchequer Chamber in *Ireland* affirming a previous judgment of the Court of Common Pleas.

The Respondents here were the Plaintiffs in the Court below, and brought an action of ejectment against *Liddy* for the recovery of a piece of land forming part of the lands of *Clonan*, in the barony of *Belfast*, in the county of *Antrim*. The land, the subject of this demise, was a field containing brick earth, and was intended to be used in brickmaking. In the month of February, 1863, *James Kennedy*, one of the Plaintiffs, then the sole owner of the land in question, granted to *Liddy* and *Charles Morrison* (since deceased) a seven years' lease of the land in question, which was described as "containing 5A. 2R. 20P.," at a rent of £100 a year. The lease contained the usual covenants of distress and re-entry for rent in arrear, covenants as to the mode of using the land, and this farther covenant, on which the present question arose: "It shall be lawful for the said *James Kennedy* (*sic*) at any time during the continuance of this demise upon giving to the said *J. Liddy* and *C. Morrison*, their executors, administrators, or assigns, or leaving at their usual or last known places of abode from the 1st of October to the 1st of April in any year, one month's previous notice in writing, and from the 1st of April to the 1st of October three months' previous notice in writing, of his or their (1) intention to resume,

(1) There was no mention in the previous part of the sentence of "heirs or assigns" of *Kennedy*.

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for building purposes, the possession of any portion of the premises hereby demised, it shall be lawful for the said *James Kennedy*, his heirs or assigns, to enter into such possession, and thereupon, and on obtaining such possession, it is hereby agreed that the portion or quantity of ground so taken should be valued at the rate of £20 per statute acre, and that the rent hereby reserved shall be proportionably reduced."

C. Morrison died on the 1st of October, 1863.

On the 25th of November, 1864, an indenture was executed between *James Kennedy* of the one part, and his brother *Victor Coates Kennedy* of the other part, whereby *James Kennedy* covenanted with *Victor Coates Kennedy* to stand seised of lands, including the land in question, to the use of them, the said *J. Kennedy* and *V. C. Kennedy*, their heirs and assigns, as tenants in common.

On the 9th of November, 1865, a notice, dated on the previous 31st of October, was, at the house where *Liddy* lived, served by one *McElroy*, who left it with *Rosa Mulholland* at that house, and *Rosa Mulholland* promised to deliver the same to *Liddy* on his return from the country, which she expected would be in a few days. *McElroy* served Mrs. *Morrison*, the widow of the other tenant, personally with a similar notice. The notice thus served was in these terms: "In pursuance of the covenants and conditions contained in a certain indenture of lease, bearing date the 28th day of February, 1863, made between the undersigned *James Kennedy* of the one part, and you the said *James Liddy*, and *Charles Morrison*, since deceased, of the other part, we now give you notice that it is our intention to resume, for building purposes, the possession of the entire premises demised by the said lease, and hereby put an end to the demise thereby made, and the term thereby granted, at the expiration of one month from the service of this notice upon you; and we require you upon the expiration of this notice to deliver up to us the quiet and peaceable possession of all the premises demised by the said lease, that is to say, all that piece or parcel of land part of the lands of *Clonan*, containing 5A. 2R. 20P. statute measure, or thereabouts, bounded on the north-east by the land of Colonel *Glover*, on the east by the river, and on all the other parts by the property of the said *James*

Kennedy." This notice was signed by both *James Kennedy* and *Victor C. Kennedy.*

The cause was tried before Mr. Justice *O'Hagan*, at the *Antrim* Assizes in the summer of 1866, and a verdict by direction of the learned Judge taken for the Plaintiffs. A rule was afterwards obtained to set aside that verdict and enter a verdict for the Defendant, or a nonsuit, or for a new trial on the ground of misdirection. In Hilary Term, 1867, this rule was discharged. The case was then taken to the Exchequer Chamber, where it was argued before six Judges—the Lord Chief Justice of the Queen's Bench, the Lord Chief Baron, Mr. Justice *Fitzgerald*, Mr. Baron *Hughes*, Mr. Baron *Fitzgerald*, and Mr. Justice *O'Brien*. The first three of these learned Judges were for affirming the judgment of the Court below; the last three were for reversing it; and the Court being thus equally divided the judgment stood affirmed. This appeal was then brought.

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Mr. *McMahon* (of the Irish Bar), and Mr. *Macafee*, for the Appellant:—

On the true construction of this lease there is no right in the Respondents to resume possession of the whole of the land. Suppose no other objection to exist to this ejectment, it is clear that on this lease the quantity of land to be resumed cannot exceed five acres. Each acre is measured by an amount of £20 per annum, and all the five acres being resumed, and £20 allowed for each acre, the whole rent under the lease would be extinguished. Suppose the Plaintiffs to be entitled to resume the land leased, their right is limited to this quantity. That would leave a part of the land still in the hands of *Liddy*, a part over which the Plaintiffs have no right. Yet their notice embraces not only the five acres, but the whole; and the whole is sought to be recovered in this ejectment; that is to say, the part over which they have no right, as well as that which is within the terms of the proviso. A different construction of the lease would disregard the provision which settles the ratio of the value of each acre, and declares that on each acre resumed the rent shall be diminished by the amount of £20 per acre.

The Court below, upon this point of the power to resume the

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whole, proceeded on the supposed authority of *Doe d. Gardner v. Kennard* (1), where, in the course of the argument, Lord Denman interposed the remark, "The right to take every part results from the reservation of the right to take any part." There is, however, a great distinction between the two cases. Here the words are, "the possession of any portion of the premises hereby demised," and each portion is marked out by the sum of rent to be allowed for it; there the words were "shall be desirous of having any part of the said piece of land delivered up to him;" without anything to mark the exact quantity, or to give a definite and precise description of what was to be so delivered up; then followed a distinct covenant by the lessee to surrender the piece on payment of a reasonable compensation; and finally there was not a mere covenant to surrender, but the lessor was also empowered to take possession. The words, therefore, were much stronger than they are here, and there was nothing which, by measuring the money to be paid according to the quantity of land surrendered, ascertained the exact quantity in a clear and distinct manner. That case consequently cannot govern the present. In *Doe d. Willson v. Phillips* (2) there was a covenant to surrender. There is none here. The words of an instrument like this lease must be strictly followed. Under a provision in a lease that if the premises should be wanted by the lessor for building, the tenant should deliver up the possession, a demand of possession made on the ground of the lessor having entered into a treaty, not that he had entered into an actual agreement, for building, was held insufficient: *Russell v. Coggins* (3). A trust for sale, vested in A. and his heirs, cannot be executed by an assign of A.: *Bradford v. Belfield* (4).

The right of these Plaintiffs is not that which was possessed by the lessor. There has been a severance of the reversion, and the right of re-entry has been destroyed, yet a re-entry is necessary here if the land is to be resumed as on condition broken. The notice does not determine the estate. The right to give a notice to determine the lease was personal to *James Kennedy*. After his conveyance to the Plaintiffs as tenants in common he could not by himself, nor could the plaintiffs jointly, determine the lease by notice. The

(1) 12 Q. B. 244, 253.

(2) 2 Bing. 13.

(3) 8 Ves. 34.

(4) 2 Sim. 264.

proviso here was a condition to defeat a lease. Such a condition is not favoured, but must be strictly construed. If an actual entry here was necessary to determine the lease, none has been proved. If the proviso merely amounts to a covenant to surrender, it can only, in the circumstances of this case, be enforced in equity: *Williams' Saunders* (1); *Ferrers v. Borough* (2); *Coxe v. Day* (3); *Doe d. Poole v. Errington* (4); *Doe d. Marriott v. Edwards* (5); *Fenn d. Matthews v. Smart* (6); *Littleton* (7); *Comyn's Digest* (8); *Co. Litt.* (9); *Sheppard's Touchstone* (10); *Goodright v. Forrester* (11); *Hilton v. Earl Granville* (12); *Doe d. Wilson v. Abel* (13); *Doe d. Willson v. Phillips* (14); *Russell v. Coggins* (15); *Doe d. Phillips v. Rollings* (16); *Arnsby v. Woodward* (17); *Wright v. Burroughes* (18); *Doe d. Newnham v. Creed* (19); *Anonymous* (20); *Ripley v. Woods* (21); *Baylis v. Le Gros* (22); *Orr v. Stevenson* (23); *Hardy v. Seyer* (24); *Townsend v. Wilson* (25); *Selby v. Browne* (26); were authorities cited and commented on. Reference was also made to the 32 Hen. 8, c. 34, and the 23 & 24 Vict. c. 154. "The Act to consolidate and amend the Law of Landlord and Tenant in Ireland;" and it was contended that nothing in that Act cured the objection arising under the deed of 1864 (27).

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- (1) Vol. ii. p. 368, n. 2.
- (2) Cro. Eliz. 665; Owen, 116.
- (3) 13 East, 118.
- (4) 1 Ad. & El. 750.
- (5) 5 B. & Ad. 1065.
- (6) 12 East, 444.
- (7) Sec. 347.
- (8) Assignment, C. 2.
- (9) Page 214, 219 b.
- (10) Page 158.
- (11) 8 East, 552.
- (12) 5 Q. B. 730.
- (13) 2 M. & S. 541.
- (14) 2 Bing. 13.
- (15) 8 Ves. 34.
- (16) 4 C. B. 188.
- (17) 6 B. & C. 519.
- (18) 3 C. B. 685; 16 L. J. (C.P.) 6.
- (19) 4 M. & S. 371.
- (20) 3 Leon. 269.
- (21) 2 Sim. 165.
- (22) 4 C. B. (N.S.) 537-554.

- (23) 5 Ir. Law. Rep. 2.
- (24) Cro. Eliz. 414.
- (25) 1 B. & Ald. 608.
- (26) 7 Q. B. 620.
- (27) 23 & 24 Vict. c. 154, s. 1:
"The word 'landlord,' shall include the person for the time being entitled in possession to the estate or interest of the original landlord, under any lease or other contract of tenancy, whether the interest of such landlord shall have been acquired by lawful assignment, devise, bequest, or act and operation of law, and whether he has a reversion or not. The word 'tenant' shall mean the person entitled to any lands under any lease or other contract of tenancy, whether the interest of such tenant shall have been acquired by original contract, lawful assignment, devise, bequest, or act and operation of law."

4 M. & S. 513.

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There was also an objection taken that the service of the notice was not sufficient. There ought to have been an explanation of it given to *Rosa Mulholland: Woodfall*, Landlord and Tenant (1).

Mr. *Jessel*, Q.C., and Mr. *W. D. Andrews*, Q.C. (of the Irish Bar), appeared for the Respondents in Error, the Plaintiffs below, but were not called on to address the House.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, the whole question in this case turns upon the construction which ought to be given to a particular clause contained in an indenture of demise:—[His Lordship stated it, see *ante*, p. 135.]

In the first instance, I cannot help quoting the words of Mr. Justice *Fitzgerald* with respect to what was the intent of the parties in this instrument. In consequence of the shorthand writer not having given a very accurate note of the judgment, and having on some occasions missed the exact force of the words used, we cannot rely upon this report with as much certainty as we might otherwise do; but the expression of the learned Judge is this: After quoting a saying of *Plowden's*, that "Our law is the most reasonable law on earth," which he thinks to be true now, he says: "It requires the substance more than the shadow or form, and it requires it so that the intent of the party shall be carried out." And he goes on to say: "I think, applying that rule to the case before us, I have here the agreement of the parties expressed in terms clear and unmistakable—call it what you like, a condition or limitation. If the lessor is not entitled to succeed, we are giving effect not to the substance, but defeating it by the form; but if, on the contrary, we hold that the Plaintiff is entitled to succeed, we are carrying into effect the wise agreement"—(I cannot help thinking that the word "wise" should be "very")—"we are carrying into effect the wise agreement entered into between the parties, as to which no one reading this contract can doubt the power. That if at any time for building purposes the lessor shall require the whole or a portion of the premises the subject of this demise, upon expressing his wish by a notice served upon the

tenant he should be permitted to resume possession." That seems to be good sense, and it is what may be supposed to have been the intention of the parties; but, by the ingenuity of counsel, we have had many difficulties thrown in the way of giving the contract that construction. Reference has also been made to a large class of authorities which, happily for this subject, as regards *Ireland* at least, have been superseded by the effect of the statute of the 23 & 24 Vict. c. 154, to which reference is made by the Judges in the Court of Exchequer Chamber.

The first difficulty thrown in our way is this:—It is said that this agreement is not an agreement that can possibly be construed as an agreement to resume the whole of the land, because although there are cases which seem to be analogous, or to run on all-fours with the present, such as the case of *Doe v. Kennard* (1), and others, determined upon instruments of a construction similar to this, yet there is this peculiarity in the case now before us—that, on the notice being given to resume, £20 are to be calculated for each acre, and the rent is to be proportionably reduced. It is said that the proper construction of those words is, that when any part of the land is resumed you are to reduce the rent of the tenant by the extent of £20 for every acre so taken, and that you are to go on reducing the rent with every resumption of a portion of the land, and that when you have gone through this process for five acres you will have a balance of land remaining, consisting of two roods and twenty perches, as to which no reduction can be made, because you have already reduced, or rather extinguished, the whole rent. And therefore it is contended that the proper construction of this instrument, and the purport of this particular clause, is this—that the whole of the land should never be resumed, but that you are obliged, by the very construction of this clause in the lease, to leave at last this small portion of two roods and twenty perches, and that then, as there is no more money that can be paid in the shape of any reduction of the rent, the necessary inference must be that these small portions were never intended to be resumed; and that whatever the landlord might do as to giving successive notices, there must always remain a piece of the land which he could never acquire, namely, two roods and twenty perches.

(1) 12 Q. B. 244.

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That would, indeed, be a singular result to bring out of this clause, there being nothing whatever said in the rest of the lease at all affecting such a question as that, and nothing in the clause itself indicating that such a singular arrangement was contemplated. If such had been the true and proper construction of the clause, then, as one of the learned Judges said, there would be but one only course open to the landlord to take in order to carry into effect what seems to be the much more natural proposition, namely, that he should have the power to resume from time to time such portions as he thought fit for the purpose of building. That course would be to watch how his tenant worked the land, and to fix upon some portion amounting to two roods and twenty perches which had been rendered worthless either through having been worked out or from some other cause, and to say: That part of the land I will not take, and I will give my notice only for five acres, leaving the other part of the land in the enjoyment of the tenant. But such a construction of the agreement as that would be so monstrous and absurd, when you look upon it as a condition of the agreement to be raised by inference without the slightest expression of it in the lease itself, that I think your Lordships will be of opinion that it does not call for any farther consideration. I hold it, therefore, to be very clear that the agreement extended to the whole land, and that under this agreement the landlord had the power of resuming either the whole or any portion of the land which he thought fit. I do not think I shall find it necessary to say any more as to the words of the reservation, which cannot, by any possible construction, be read as leading to what the Appellant contends for.

Then, the next objection is this, that the Appellant's notice was not a proper notice, and that *Kennedy*, the lessor, was not in a condition to serve the notice, because it was a notice to be served by the lessor personally, and that none but *James Kennedy* himself could serve it; and that he, having parted with a portion of his reversion, was no longer in a condition to serve any notice at all; that he, having parted with his interest in the property, no notice could any longer be given for the determination of the tenant's interest.

It seems to me that that objection, whatever be the weight that

ought to be attached to it, is in substance the same objection as another to which I shall have to refer, namely as to the effect of Mr. *Kennedy* having parted with a portion of the reversion after the execution of the lease. I shall therefore take those two parts of the case together, and consider the service of the notice by Mr. *Kennedy*, together with the circumstance that he had parted with a portion of the reversion, as forming one objection to the decision of the Court below.

Now, what happened was this: *James Kennedy*, in the year 1864, executed a deed by which he covenanted to stand possessed on behalf of himself and his brother *Victor Kennedy*; and the latter, having so become seised, joined in serving this notice. The question, then, is, what is the effect of that joint notice so delivered in determining this interest in the premises, assuming, for the present purpose, that it is to be taken (as the Chief Justice assumed it), not as a conditional limitation, but as a condition which is to be fully and strictly performed, regard being had, not only to the old law, but to the statute of the 23 & 24 Vict. c. 154.

Now, as regards a condition of this kind, very many authorities have been cited to satisfy us that after the severance of the reversion, after this change in the interest of *James Kennedy*, great difficulty would be experienced, as matters stood under former decisions, in holding that this lease could be terminated, under any circumstances, by the effect of the proviso. But what has happened in *Ireland* has been this, that although it may be held in *Ireland* that the statute of Hen. 8 (to which the statute of Chas. 1, in *Ireland*, was analogous), dealing with the interest of assignees of reversions, is not applicable to a case like this, where the reversion has been severed, and therefore does not enable persons, where the reversion has been parted with, to avail themselves of the previous construction of this proviso, yet the statute for *Ireland* of the 23 & 24 Vict. c. 154, has entirely remedied that defect. It appears to me that this statute has been framed for the express purpose of removing some of those technical difficulties which stood in the way of justice, and which, though devised originally with logical regard to consequences, have been found in practice to involve far more frequently the failure of justice than to secure any beneficial result to the parties; it carries

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into effect the true meaning of the contracts into which they had entered.

This statute begins with a definition of what a landlord and what a tenant shall be held to be. The terms are these :—[His Lordship read the section, see *ante*, p. 139, note (27).]

Having thus defined the “landlord,” the Act proceeds in the 12th section to say this: that “Every landlord”—that is, every person who has acquired an interest as such, whether by lawful assignment or devise, or by operation of law, or whether he has the reversion or not—“Every landlord of any lands holden under any lease or other contract of tenancy, shall have the same action and remedy against the tenant and the assignee of his estate or interest, or their respective heirs, executors, or administrators, in respect of the agreements contained or implied in such lease or contract, as the original landlord might have had against the original tenant or his heir or personal representative respectively.”

Now, who comes within that description “landlord” in this case? I apprehend it is perfectly clear, without any stretching whatever of the terms of the Act, that the landlord who now stands in the place of the original landlord here is the conjunct landlord, and that *James Kennedy* and his brother, who stand seised, have now, through that instrument which was executed in 1864, acquired the right which was originally in *James Kennedy* alone. It is no forcing of words to say that *James Kennedy* and his brother, in the present case, in virtue of that instrument, have come to be in the position of landlord in the sense of this Act.

Then, farther, it is enacted in the 44th section, “The surrender to or resumption by a landlord, or eviction of any portion of the premises demised by a lease, shall not in any manner prejudice or affect the rights of the landlord, whether by action or entry, or ejection, as to the residue of said premises.” That is not unimportant, because it appears to me that a great part of the learned argument we have heard upon this occasion goes to strike at the very object and intent of this Act, when it is said (as it was by Mr. *McMahon*, in reply to some observation made by one of your Lordships) that construe the Act as you will—as an Act to enable the assignee of the original lessor to have (notwithstanding the change of reversion) all the benefits secured to the original lessor,

independently of the doctrine of Common Law, still the change in the reversion here effected has interfered and proved an obstacle to his rights, for the Act does not provide (this is a very subtle part of the argument) that where the original lessor has deprived himself of the right of a lessor by executing such an instrument, and has introduced his brother as tenant in common with himself, he shall have the benefit of this new provision, and that there shall be saved to him those rights with which he has parted by the execution of such an instrument as that of 1864. The Appellant, in effect, says: "True it may be that a single assignee, or a number of assignees, as tenants in common from the original lessor, might be entitled to rights by virtue of this Act; but where do you find any provision reserving those rights to the lessor himself when he has parted with a portion of his interest?"

It would be very singular if you could put such a construction upon this Act. It would be contrary to the very provisions of the statute, for the landlord is carefully protected by the 44th section, which provides that if he parts with a portion of his interest to another he shall be in no worse position, and shall not be deprived of these remedies which the Act was intended to give him. I apprehend the true answer to this objection is, that "any landlord" means any person or persons, including the original lessor himself, who by any subsequent deed or instrument derived from the original lessor, can assert a title to the land; and as to any difficulty that may arise in this respect, it is answered by Mr. Justice *Fitzgerald*. The difficulty pressed upon us was, that, in such a case, where the resumption of the land is to be for certain purposes, and is claimed to be made by tenants in common, they may give notice singly to resume the land, and, when that is done, what is to be done with his divided interest? What is to be done if, for example, the tenants in common differ in their views with respect to building? The answer is a very simple one. Mr. Justice *Fitzgerald* has afforded it; he says: "It was said that great inconvenience would ensue if that condition of things would allow a man to harass a tenant; but the answer is, there is nothing embarrassing in that; for the result of the altered law is, no matter how you divide the reversion, all the owners of it must concur in the act, which must divide the estate." In truth, there is no greater difficulty as to

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difference of mind of the persons desiring to employ the land for building than there would be in the case of any coparceners under any other circumstances. The answer is a perfectly valid one, that in order to avail yourself of a process of that description the notice must be a notice by all the persons who have acquired an interest in the reversion. Then, if that be the proper construction of the Act (and it seems to be the proper and sensible construction), it meets both the objections which have been raised, as to whether the notice given by *James Kennedy* and *Victor Kennedy* would be a good notice, and also as to whether or not the reversion being divided they could avail themselves of this proviso contained in that deed, because the Act says that all the persons interested as one collective landlord are to have all the benefits which belonged to those from whom they derive their title; all the benefits of all the agreements and arrangements that are found in the deed. I apprehend, therefore, that the two brothers are now entitled to all the interests originally vested in the one brother, and to all the benefits which this provision for the right of entry would have enabled *James Kennedy* himself to claim.

But we must not forget an objection which was strongly pressed upon us, that in reality there was no right of entry in *James Kennedy*, for that he has a simple covenant of agreement to be enforced in Equity. It is said that he had neither the right to enter on the ground of condition broken, nor the right to re-enter by way of limitation, conditional on certain things being done. I do not adopt that argument, and I apprehend the true intent and meaning of the clause is this: When you find a power in the lessor to resume possession for building purposes on giving notice, and the effect of that notice is to declare it lawful for him, the lessor, his heirs and assigns, to enter into possession—the necessary conclusion is, that that possession shall be delivered up by the tenant from the moment of the condition being fulfilled which is to give to *Kennedy*, the lessor, the right of resuming possession. *Kennedy*, by giving that notice, and by asserting his right by action of ejectment, or civil bill (as it is called in *Ireland*) does what is equivalent in Law to entry, and establishes his right to recover possession through the medium of ejectment. The great majority of the Judges in the Court below seem to have had no

doubt upon that question ; they seem to have considered that the process under the Common Law Procedure Rules with reference to these proceedings, gave to the Judges all the same powers which they would have had by the original action of ejectment, and that under the old law it would have been held that by that ejectment itself he had entered. And we have also heard a learned argument—in which everything has been suggested that ingenuity could suggest—that in consequence of the estate not being determined by this notice no right of entry was given, the case is brought back to another jurisdiction, namely, that of Equity instead of Law. I confess I cannot enter into that view of the whole subject. It appears to me that there being reserved a plain and distinct right on the part of the lessor, not only to resume, but upon resumption to enter, that right was strictly vested in him at the time when this entry was made, and that he was entitled to recover in this action of ejectment, as the Judges held unanimously in the Court of Common Pleas, though unfortunately they were divided in the Court above with reference to this technical objection as to the severance of the reversion. I am of opinion with the majority of the Judges of the Court of Common Pleas, and think that the opinion of the three learned Judges of the Exchequer Chamber who adopted that view was also correct. As regards the last point which was raised, namely, as to the due service of notice, I do not think it necessary to say one word upon that. It appears to me that there has been no substantial appeal to us upon that point.

I am, therefore, of opinion that upon every point that has been put before us the Appellant has failed in his contention, and that the result ought to be the dismissal of this appeal with costs, and the confirmation of the judgment of the Court below.

LORD CHELMSFORD :—

My Lords, I entirely agree with my noble and learned friend upon all the points—[His Lordship having fully stated the case, said :—] It has been contended that that judgment ought to be reversed on several grounds which were very clearly stated by Mr. *Macafee* in his opening. First, because a notice to resume possession of the whole was a bad notice ; second, that the con-

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veyance by the Respondent to himself and his brother severed the reversion, and destroyed the right of entry; thirdly, that the right of entry was personal to *James Kennedy*; and fourthly, that there was an express provision in the clause in question for an actual entry, which had not been made.

On the question whether, upon the entire clause the lessor was entitled to resume possession of the whole of the land, I think there can be no question whatever, because the words are that "he shall be entitled to resume the possession of any portion of the premises hereby demised." It is quite clear that the words, "any portion of the premises," must mean each and every portion; and I should have come to that conclusion if I had not the support of the authority of the Court of King's Bench in the case of *Doe v. Kennard* (1), a case nearly identical with the present, in which Lord *Denman* said: "On the mere construction of the words, the point is too clear for argument. The right to take every part results from the reservation of the right to take any part."

But, then, it is said by the learned counsel for Mr. *Liddy* that, by the peculiar wording of this clause, particularly the latter part of it, it is quite evident that it never could have been the intention of the parties that the lessor should have a right to resume the whole of the land, because if the land was taken it was to be paid or compensated for by a reduction of rent, and that was to be valued at the rate of £20 per statute acre, and "that the rent hereby reserved should be proportionably reduced." It is not, however, correct to say that the mode of estimating what the lessee was to be entitled to receive, on the resumption of possession by the lessor, was to be by reference to the rent and by a reduction of the rent; because it is said, "It is hereby agreed that the portion or quantity of ground so taken shall be valued at the rate of £20 per statute acre, and that the rent hereby reserved shall be proportionably reduced." It is a valuation that is to be made, at that rate, of the compensation to the lessee for depriving him of his land; and I see no difficulty whatever in considering that there being 5A. 2R. 20P. demised to the tenant, if the whole is taken, the whole may be taken at the value of £20 per statute acre; that is, the five acres would be valued at that rate, and the

(1) 12 Q. B. 244.

2R. 20P. would be valued at the same rate; and the tenant would thus have compensation for the whole land which was taken from him.

Observe, the tenant is not to pay any rent when his lease is determined in this way; but he gets the benefit of the full compensation for the whole of the land under the words that the land shall be valued at the rate of £20 per statute acre. There is no difficulty in putting a reasonable construction on the words "that the rent hereby reserved shall be proportionably reduced," as applying to the right to take the whole of the land, because it must be taken to mean, "If the whole of the land is taken the whole of the land is to be valued at the rate of £20 per statute acre. If part of the land is taken, it is to be valued at the same rate, but then the rent reserved is to be proportionably reduced."

I think, therefore, it is perfectly clear that the notice to take the whole of the land was a good notice, and that if the lessors were entitled to the possession of the land, and possession was not given under that notice, then the ejectment might be maintained.

But then it is said that the indenture of the 25th of October, 1864, severed the reversion, and that consequently the right to determine the lease was destroyed. That argument raises the question: What is the character of the clause in question? Is it a condition, is it a covenant, is it an agreement, or is it (which appears to be more clearly a description of it) a power which is agreed upon between the parties that the lessor shall possess, of determining the interest of the tenant, and resuming possession on giving a certain notice? If it be so, I apprehend that all the learning which has been employed in this case with regard to the destruction of a condition by the severance of the reversion is entirely out of the question, and that the power here would not be determined by the interest of the landlord, or a portion of the interest of the landlord, being parted with to another person.

But then, supposing that under the Common Law this clause in the lease might be subject to the objection that the reversion, or a portion of the reversion, was parted with, and that the power or condition, or whatever it may be called, would be subject to the

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objection that the power was entirely gone, we have in this case the *Landlord and Tenant Act in Ireland*, the 23 & 24 Vict. c. 154, which appears to me, whatever may have been the Common Law upon the subject, to put the question upon an entirely different footing. The clauses of that Act to which attention has been directed, appear to me to be perfectly clear upon the subject. It seems to have been the intention of the Legislature that parties in the position of *James* and *Victor Kennedy* should be entitled to use the power which was conferred upon them for the purpose for which it was intended.

Now, what is the interpretation clause with regard to the word "landlord?" It is to include "the person for the time being entitled in possession to the estate or interest of the original landlord under any lease or other contract of tenancy, whether the interest of such landlord shall have been acquired by lawful assignment, devise, bequest, or act and operation of law, and whether he has a reversion or not."

It was said by Mr. *McMahon* that this applies only to the case of the assignee of the original landlord and not to the original landlord himself. It would be a very extraordinary state of things, that the landlord by parting with a portion of an interest should give to the assignee a right, and by the same act should deprive himself of the right which he previously possessed in respect of the interest which he retains. But it appears to me, then, that the words "entitled in possession to the estate or interest of the original landlord," may very well apply to the case of *James Kennedy*, because *James Kennedy* is not in possession of the entire estate and interest of the original landlord.

Then the 12th section provides that "Every landlord of any lands holden under any lease or other contract of tenancy shall have the same action and remedy against the tenant and the assignee of his estate or interest, or their respective heirs, executors, or administrators, in respect of the agreements contained or implied in such lease or contract, as the original landlord might have had against the original tenant or his heir or personal representatives respectively."

But then it is said, that the notice which is to be given under the lease is a notice that is personal to *James Kennedy*. I have

very considerable doubt whether that is so ; whether, in fact, it was not intended, and whether the clause may not be construed in this way, that *James Kennedy* and his assigns should have the right of resuming possession on giving notice. But, however that may be, it is quite clear that the notice having been given by *James Kennedy*, *James Kennedy* is entitled to act for himself and his brother ; and supposing that the brother had no right to join with him in giving that notice, still it would not vitiate the notice given by *James Kennedy*, who may act in that respect both for himself and for his brother, and in that way the notice would be good and valid.

Then it is said, that in this case there ought to have been an actual entry, and it was not sufficient to bring an ejectment, as denoting the intention of the Plaintiffs to resume possession. Now, undoubtedly, there are many cases where parties stipulate that advantage shall not be taken of a forfeiture except by an actual entry upon the land. But this is not a case of forfeiture at all ; this is the case of an agreement between the parties that the Plaintiffs (the lessors) shall have the power to determine the lease upon giving a certain notice, and shall be entitled to enter into possession. Now, I apprehend it is perfectly clear that the parties not having expressly stipulated for actual entry upon the land to determine the possession, it was sufficient under this clause for the lessors to give notice, in the regular way, of their intention to resume the land, and then, under the agreement conferring the power upon the lessor to give this notice, it was the duty of the tenant to give up that possession upon the expiration of the notice. In addition to the notice, before the ejectment was brought, there was a demand of possession, which was not necessary, but which may be said to have enforced this duty upon the lessee, and undoubtedly gave a right to the Plaintiffs to bring this action of ejectment.

With regard to the question as to the proper service of notice, I think, with my noble and learned friend, that there is nothing whatever in that. The jury has found that it was served at the usual place of abode of the Appellant, and that was quite sufficient. Therefore, on all grounds, I am quite clear that the judgment of the Court below ought to be affirmed.

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LORD WESTBURY:—

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My Lords, I regard this as a very plain case, and it would be hardly necessary to say a word about it except for the purpose of relieving it from the mass of legal learning that has been accumulated upon it.

In this lease there is a proviso which is entirely collateral to the demise. It is a proviso enabling the lessor, on giving a certain notice, to resume possession of any part of the land; and it is most material to observe, that the proviso goes on to give the remedy consequent upon that notice, namely, that it shall be lawful for the lessor, his heirs and assigns, to enter into possession of the land described in the notice. The ejectment brought by the landlord, and the remedy of the landlord, are therefore remedies not to be attributed to the general powers of a condition of re-entry, but are to be attributed to the special power given by this particular reservation, which is contained in what I have called a collateral clause. The whole of the learning, therefore, that we have heard about the one and indivisible condition, and about that not being assignable with the reversion according to the old law, and about that not being apportionable and accompanying part of the reversion, according to the alleged existing state of the law, has really no application whatever, because the power to proceed by ejectment is given in this particular section in terms, and it is consequential upon the notice, and not consequential upon any breach of the covenants contained in the lease.

Then there has been another difficulty raised by the excessive ingenuity of the parties. It has been said that it is impracticable to carry out this proviso of resumption, because we are told that the land, when resumed, will be resumed at the rate of £20 per statute acre; and if five acres were resumed, the whole rent would be extinguished; and that consequently there would be no rent reserved in respect of the residuum of the land. Now, that argument arises from a most obvious fallacy, and the fallacy is this, that you are construing the word "proportionably" as meaning proportionably to the original rent, whereas the proportion indicated is the ratio between the quantity of the land resumed and the quantity of the land originally demised. Therefore the moment you have accurately interpreted the word "proportionably," and

ascertained the elements of the ratio thereby indicated, there is no difficulty in the case upon that ground.

Again, with regard to the £20 to be deducted for every statute acre resumed, it is a fallacy to suppose that that is a reduction of the rent. It is a price which is assigned as a compensation for the land taken. Nothing can be indicated more clearly than that; for the right to compensation does not arise to the tenant until the landlord is re-instated in possession; and on his recovering his possession an agreement arises, namely: "It is hereby agreed that the portion or quantity of land so taken shall be valued at the rate of £20 per statute acre." So that when the original demise with regard to the land resumed is put an end to by the notice, and by the entry into possession consequential on the notice, then immediately arises a new contract for the purpose of performance between the parties, and that is the contract with respect to the compensation which is to be paid to the tenant. It might have been put down at £100 or £150 per acre; that would not matter at all with regard to the true construction of this proviso.

Certain trifling points of law have been raised which do not require to be observed upon very minutely, as they have been already abundantly dealt with. It is said that it was a personal power confined to *James Kennedy* individually, strictly, and properly. That is by no means the fact. It is a power reserved, with respect to the land, of determining the demise; and the power, therefore, is appendant and appurtenant to the reversion; and *James Kennedy*, to whom the power is reserved, reserves it in right of his estate. It is a thing taken out of the demise by the individual owner who makes the demise. It is, therefore, a thing incidental to the estate vested in him, and passes with that estate to his grantees or alienees of the reversion.

Another point that was mentioned was this: Whether the words "any portion" of the premises could extend to the entirety? Why, *ex necessitate*, it must be so, unless you commit the absurdity of supposing that the power could not be exercised if you allowed half-an-inch or a barleycorn of the original land to remain. That is so great an absurdity, that it naturally led the learned Judges to say that "any portion" was equivalent to "every other portion."

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That is a point settled by authority, in conformity with the dictates of good sense.

There is, I apprehend, nothing else which it is necessary for me to observe upon that has not been sufficiently dwelt upon by my noble and learned friends. But if it were possible to hold that the ejectment is brought under, and by virtue of, the original condition of re-entry contained in the lease, and then that a difficulty would arise from the old state of the law as to the assignee of a part of the reversion being entitled to join, I should answer that by saying, as has been already said, that the object of the Act of Parliament of the 23 & 24 Vict. c. 154, was to remove that difficulty; and there can be no doubt that it has accomplished that. The fallacy committed in construing it is this: it is said that the assignee is to have the right which the assignor had; but the assignor has no right at all. The answer to it is simple: The assignee is to have the same right which the assignor had at the time of the assignment; and if the assignor could have entered for breach of the condition by force of the Statute, the assignee may do the same.

I will only farther advert to the inaccurate language which occurs in some of these judgments as to this proviso being a limitation. It is merely a confusion of terms. With regard to the difference between a condition to declare a term at an end, and a condition that on an event happening the term shall come to an end and be determined, and a condition giving only a right of entry, we know very well that considerable difficulty arose from provisos putting an end to a term, and an event happening that might not be known to the lessor, because it was supposed that it might endanger his right of remedy for breaches of covenant that might have occurred antecedently to the event. Therefore it has been the practice in modern conveyancing to put in provisos for re-entry, instead of provisos for putting an end absolutely to the lease. Now here we have got a proviso for re-entry. It has been held, also, that where you have a proviso for re-entry, it was right that there should be a re-entry before the ejectment is brought. But that never applies to the case where the right of re-entry is given upon antecedent notice. Here, in the clause which we have to construe, you will observe that the right to re-enter is on the expiration of the notice; and in such a case as that there never

was any necessity felt for actual re-entry, because the attention of the tenant was called at once to the determination of the landlord to resume possession. If there had been a breach of covenant, and the landlord went on without entering, and received rent from the tenant, it was held that the tenant might infer a waiver of the breach; but whenever there was an antecedent notice, upon the expiry of which the landlord had the right of re-entry, the bringing an ejectment was a sufficient exercise of that right, and no difficulty could be raised upon that.

My Lords, I am very sorry that this case has been attended with so much accumulated expense, because in reality there was no question here to demand the intervention of a Court of Justice. The case was plain in good sense, in reason, and in law; and no question ought to have been raised on the subject.

LORD COLONSAY:—

My Lords, I have very few observations to make upon this case. In the first place, as to the construction of the clause which has given rise to this question, I listened with a great deal of interest to the ingenuity which has been directed to the construction of that clause in order to shew that there was no power reserved by this clause to the lessor to resume the whole premises, but that it was necessarily limited to the resumption of part. That argument was deduced mainly, if not entirely, from the concluding words of the clause, which say that the value of the land to be resumed is to be at the rate of £20 per statute acre, and is to be deducted from the rent. Whence it was argued that as the rent is £100, if the whole land was taken the quantity taken must be valued at more than £100, because there are upwards of five acres, and that therefore the clause could not have contemplated the resumption of the whole of land which, at the rate of £20 an acre, would exceed the amount of the rent. But that is introducing into this clause an element for computing the sum to be paid which may be reasonable enough in itself, but which is not the proper measure of the power here to resume the land. It is introducing an element for curtailing the power of resuming the land, or portions of the land, by a calculation founded upon a reference to what is not contained in the clause, namely, the amount of rent to be paid under the lease. I

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therefore am of opinion that the clause is not, by reason of that condition at the end of it, in any way excluded from what would otherwise be the fair construction of it, namely, that the power to resume any part of the land at any time implies a power to resume the whole.

As to the effect of that clause with reference to the points of law that have been argued, I certainly do not feel so familiar with the law of landlord and tenant in this part of the country as in another part of it, where, undoubtedly, such questions could not stand the test of argument at all. It would then have been plain, too plain to admit of argument, that the right of the landlord, and of the assignee of the landlord, was complete, so as to entitle the assignee to exercise the power reserved to him. I am happy to find that your Lordships have been able to construe that Act of Parliament which has been referred to, in the view you have taken of this case, so as to bring it into harmony with the law which we have been accustomed to administer. And I feel my mind relieved from what would have been my embarrassment in sharing the opinion of one of the learned judges in the Court below, who tells us that the distinction between condition and limitation may appear irreconcilable with common sense, but it is too clearly established by authority to be doubted. And when he finds himself at last compelled to decide upon the matter, he says: "Our decision giving judgment to the Defendant may enable him to defeat what manifestly was his contract by a technical point, but this construction of entry upon condition is too well settled for us to overrule; and until the Legislature shall alter it, I can but come to the decision I have come to." I am glad to find that there is no necessity for the Legislature to make any alteration, that that is the condition of the law now, and I think it is plainly consistent with equity. I therefore think that the judgment of the Court below should be affirmed.

Judgment affirmed, and appeal dismissed, with costs.

Lords' Journals, 1st May, 1871.

Solicitors for the Appellant: *Cruse & Bigg.*

Solicitors for the Respondent: *Hayes & Twisden.*

In re BARNED'S BANKING COMPANY.

HARMOOD W. BANNER AND J. YOUNG . . APPELLANTS;

AND

CARRUTHERS C. JOHNSTON RESPONDENT.

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May 19.

Winding-up—Securities—Proof of Debt—Notice of Appeal—Companies Act, 1862—Extension of Time for Appeal.

P. & Co. were cotton merchants at *Pernambuco*. *A.*, at *Liverpool*, wished to obtain consignments of cotton from them. They desired some security other than his own. He obtained from *Barned's Banking Company* at *Liverpool*, a letter of credit, by which the bankers authorized the *Pernambuco* firm to draw on them "against cotton purchased in conformity with instructions." The drafts were to be "covered by shipping documents, say invoices and bills of lading of cotton addressed to this company, and forwarded under separate cover by the same mail which brings the drafts for acceptance, on receipt of which documents we engage to honour such drafts." Some shipping documents of cotton were sent, and some bills were accepted—one bill was accepted without any shipping documents being sent—and then, before any one of these bills was due, the bankers became bankrupt, and bills arriving immediately afterwards were left unaccepted. On a winding-up order, issued in the matter of the bank, *J.*, who was the agent of the *Pernambuco* firm, and was also a partner in that firm, claimed to prove against the bankers for the whole amount of the bills, without bringing into account the value of the cotton which had been sold, or which remained in hand:—

Held, that he was not in a position to do so, but was entitled only to prove for the balance.

The bill-holders had no lien over the goods in the hands of the bankers, so as to enable them to treat the bankers as trustees for their interests. The bankers were only debtors to the bill-holders for the surplus remaining after the goods consigned had been applied to satisfy the acceptances.

Waring's Case (1) commented on.

The power given by the 124th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), to a Court of Appeal to extend the time for appealing may be exercised after the time given by that statute for giving notice of appeal has expired.

THIS was an appeal against certain orders made in Chancery, dated respectively the 17th of March, the 7th of June, and the 9th of July, 1869, in a proceeding under the *Companies Act*, 1862.

The Appellants were the official liquidators appointed to wind up the affairs of *Barned's Banking Company*. The Respondent

(1) 19 Ves. 345; 2 Rose, Bankruptcy Cases, 182.

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was a merchant who carried on business at *Liverpool* under the style of *Samuel Johnston & Co.*, and at *Pernambuco*, in *South America*, with other persons, under the style of *Johnston, Pater, & Co.*, and he acted, in this country, as the agent of that firm.

In December, 1865, one *Attwool* obtained from *Barned's Banking Company* a letter of credit on his account, addressed to *Johnston, Pater, & Co.*, of *Pernambuco*. It was in the following terms:—

“*Barned's Banking Company, Limited,*
“ Liverpool, December 8, 1865.”

“Gentlemen,—At the request and on account of *David Attwool*, Esq., we have this day opened a credit in your favour for £10,000.

“And you are hereby authorized to value on this bank in such sum or sums as may be convenient to you, not exceeding in the whole the said sum of £10,000, in drafts at ninety days' sight, against cotton purchased in conformity with the letter of instructions from *William Titherington*, Esq., of *Liverpool*, of this date, such drafts to be covered by shipping documents, say invoices and bills of lading of cotton, addressed to this company, and forwarded under separate cover by the same mail which brings the drafts for acceptance, on receipt of which documents we engage to honour such drafts to the extent named, if in the hands of *bonâ fide* holders, and to make them payable at Messrs. *Prescotts, Grote, & Co.*, bankers, *London*. This credit will remain in force until the 31st of March, 1866, and parties negotiating bills under it are requested to write off the amounts on the back hereof, and such drafts must specify that they are drawn under Credit No. 20.

“*Charles Mozley, a Director.*”

On the 23rd of December, 1865, the bankers granted to *Johnston, Pater, & Co.*, a similar letter of credit for £17,000, “at the request and on account of *James Baines & Co.*” This credit was to remain in force until the 20th of April, 1866, and was designated “Credit No. 49.” In the letter asking for the latter credit *Baines & Co.* said, “It is understood that we are to cover you for any drafts you may accept in virtue hereof, before maturity, so as in all cases to keep you out of cash advance.”

Three bills, all dated the 1st of March, 1866, for £3374 11s. 6d.,

£3746 13s. 6d., and £2568 15s. 9d., making in all £9690 0s. 9d. were drawn under "Credit No. 20" by *Johnston, Pater, & Co.*, of *Pernambuco*, in favour of *Samuel Johnston*, of *Liverpool*. They were all presented for acceptance on the 23rd of March, 1866, and invoices and bills of lading of cotton to the amount of 800 bales were at the same time handed to the bankers, who thereupon accepted the bills.

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The form adopted with regard to all the bills was this:

"*Pernambuco*, 1st March, 1866.

"No. 3199. Ex. for £3374 11s. 6d. sterling.

"At ninety days' sight pay the first of exchange, second and third not paid, to the order of Messrs. *Samuel Johnston & Co.*, the sum of Three thousand three hundred and seventy-four pounds eleven shillings and sixpence sterling, against Credit No. 20, and place it to account as advised by *Johnston, Pater, & Co.*

"To *Barned's Banking Company, Limited, Liverpool*.

"Payable in *London*."

The acceptance was in this form:—

"Accepted, 25th March, 1866, payable at Messrs. *Prescott & Co., London*, for *Barned's Banking Company, Limited*.

"*Charles Mozley*, Managing Director."

Two bills, one for £8755 1s. 3d., dated 28th March, 1866, and the other for £4307 13s. 10d., dated the 12th of April, 1866, were drawn by *Johnston, Pater & Co.*, under "Credit No. 49." They were drawn in favour of *Samuel Johnston*, and were in the same form as the other bills. The first of these two bills was accepted "subject to the delivery of shipping documents for 600 bales of cotton *per Amphitrite*," but no such documents were ever delivered. The second bill was not accepted, nor were any shipping documents delivered in respect of that bill.

None of the bills was paid, and the bankers stopped payment on the 18th of April, 1866. The order to wind up the company was made on the 8th of May, 1866, and liquidators were then appointed. When the cotton arrived in *England* prices were falling. Disputes arose as to the disposal of the cotton, and *Johnston* filed a bill to be secured the benefit of it. These disputes were terminated by an arrangement entered into on the 27th of

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June, 1866, between *Johnston*, the bankers, and Messrs. *Titherington, Gill, & Co.*, by which it was agreed that *Johnston* should receive the drafts of *Attwool* on *Titherington & Co.* for £8000, and likewise his draft on one *Samuel Price Edwards* for £1690 0s. 9d. (making up the whole sum of £9690 0s. 9d., the amount of the bills drawn under Credit No. 20), that the 800 bales of cotton should be sold by *Titherington & Co.*, and the proceeds applied to meet the bills for £8000; and that to the extent to which the proceeds were applicable for that purpose the liability of the company should be reduced. *Titherington & Co.* accepted two bills for £4000 each, and paid them to *Johnston*, who also received £1000 on *Edwards'* acceptance. The cotton thus sold by *Titherington & Co.* fetched £8005 12s. 11d., and they appropriated £8000 of that sum to repay themselves the amount of the bills they had accepted, and they kept the balance of £5 12s. 11d. to cover interest and charges.

The liquidators represented that the result of all these transactions, was this: "The bills drawn under the Credit No. 20, amounted to £9690 0s. 9d., payments made from the sale of the cotton applicable to these bills amounted to £9000, leaving a difference of £690 0s. 9d. The bills drawn under the Credit No. 49 amounted to £13,062 15s. 1d., the net sum obtained from the sale of the cotton applicable to these bills amounted to £10,849, leaving a difference of £2213 10s. 6d. These two differences, with certain expenses, &c., made up a sum of £3300 18s. 10d."

In answer to the advertisement for creditors issued by the official liquidators, *Johnston* sent in a claim for the full amount of all the bills, namely £22,752 15s. 10d. and interest. The official liquidators declined to admit this claim, insisting that the estate of the banking company was entitled to credit for the net proceeds of the cotton applicable to the different bills. They offered to admit *Samuel Johnston & Co.* as creditors for the sum of £3300 18s. 10d., and *Johnston* did, in fact, accept a dividend on that sum amounting to £495 2s. 10d.; but insisted on his legal right to have his claim admitted for the larger sum, and he took out a summons to be admitted as creditor for the whole £22,752 15s. 10d. The summons was heard before the Master of the Rolls, who, acting upon the authority of *Kellock's Case* (1), by an order dated the 17th of

(1) Law Rep. 3 Ch. Ap. 769.

March, 1869, allowed the claim, and directed the costs to be added to the debt. The liquidators, on the 30th of April, 1869, issued a summons for the purpose of obtaining from *Johnston* payment of the sum of £18,854 17s. 6d., being the net proceeds arising from the sales of the cottons and interest thereon, or that they might retain the dividends on the proof of *Samuel Johnston* for the £22,752 15s. 10d., until the dividends paid to the other creditors of the company should amount to a sum equal (in proportion to their respective proofs) to that which the said sum of £18,854 17s. 6d. and the dividend already paid on the £3300 18s. 10d., bore to the whole proof for the £22,752 15s. 10d. Before this summons was heard, namely, on the 4th of May, 1869, the order of the 17th of March was enrolled. This summons was heard on the 7th of June, 1869, when the Master of the Rolls made an order dismissing it with costs. The liquidators presented to the Lords Justices an appeal against this order; but when the appeal came on for hearing it was objected that the order of the 17th of March, 1869, having been already enrolled, the appeal could not be heard, nor any objection taken against that order, except by an appeal to this House. It was also insisted that no such order as that asked for by the liquidators, by their summons of the 30th of April, could be made by the Lords Justices, since that would be in direct contradiction to the order of the 17th of March. This objection was allowed by Lord Justice *Giffard*, who, on the 9th of July, 1869, dismissed the appeal with costs, but without prejudice to any application the liquidators might make to the Master of the Rolls for leave to retain the dividends pending an appeal to this House.

In the meantime, namely, on the 6th of July, 1869, *Johnston* issued a summons in the winding-up, asking that the liquidators might be ordered to pay him the dividends due on the £22,752 15s. and interest, together with the costs which had been ordered to be added to his debt. On the 27th of July, 1869, an order to this effect was made, *Johnston* giving an undertaking to repay the same if ordered to do so by a Court of competent authority.

The liquidators, on the 10th of May, 1870, obtained an Order from this House allowing them to present their petition of appeal, which they did on the 20th of May, 1870. An objection was

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taken that this appeal was too late, and that the Petition for leave to appeal not having been presented till the time limited for appealing in cases of this kind had expired, there was no authority to "extend" that time within the meaning of the *Companies Act*, 1862, 25 & 26 Vict. c. 89, s. 124 (1).

Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, for the Appellants:—

The Court below proceeded entirely upon *Kellock's Case* (2); but the circumstances of that case are very different from those of the present. The Master of the Rolls there considered *Kellock* to stand in the position of an ordinary mortgagee. In no way whatever can that be said of this Respondent; and that case, therefore, cannot govern the decision here. The contract here is one of a peculiar sort, and must be construed according to what was the plain intention of the parties. That intention was, that the shipping documents were to be delivered to the bankers, and were thus made a security to the bankers for the amount of their acceptances. They were not to be a security to the bill-holder; he was not to be enabled to treat the bills as creating an absolute liability on the part of the bankers, and yet at the same time to enjoy all the advantage of a lien on the proceeds of the sale of the cotton. The letter of credit plainly expressed that the bankers would only accept the bills upon receiving the shipping documents, which shewed that the property represented by those documents was to be the security given to the bankers to cover their acceptances. The bills which have been accepted were accepted subject to the delivery of the shipping documents, and where, as in the case of the bill for £8755, no shipping documents were delivered, the bankers cannot be made liable until those documents have been delivered, and until the property they represent

(1) Sect. 124: "Rehearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any Court having jurisdiction under this Act" may be had as from any order or decision of the same Court made in its ordinary jurisdiction, "subject to this restriction, that no such rehearing or appeal shall be

heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given, according to the practice of the Court appealed from, unless such time is extended by the Court of Appeal."

(2) Law Rep. 3 Ch. Ap. 769.

has been brought into account. As to those bills which have not been accepted, the same observation applies. The net proceeds of the cotton were always intended to be applied in reduction of the amount due on the bills, and the claim now made must be ascertained with reference to the proper equities between the parties, which require that the claimant should give the estate of the bankers credit for all sums received by him from sales of the cotton, for it was only on the security to be afforded by the cotton that the bills could have been drawn or were accepted. *Coupland's Case* (1), which was one of ordinary trading business, and not of mortgage; does almost exactly resemble the present, and must govern it.

There is no objection to this appeal on the ground of its being out of time. The Court of Appeal has, under the express provisions of the 124th section of the 25 & 26 Vict. c. 89, power to extend the time within which an appeal may be presented: *Ebbw Vale Case* (2); and the House has exercised that power in the present instance. The appeal, therefore, is perfectly regular.

Mr. *Jessel*, Q.C., and Mr. *T. H. Fischer*, for the Respondent:—

There is a preliminary objection to this appeal. It is out of time. An application was made to the House for liberty to appeal, and that liberty was granted; but the application itself was not within time, and no jurisdiction existed to grant it. The statute only gives power “to extend” the time, but that form of phrase shews that the power must be exercised while the time is running, and cannot be exercised after it has expired. That statute gives three weeks for the notice of appeal, and that limited period had expired long before any application was made to this House for leave to appeal. In *Re Bastow* (3), which, like this, was a case of winding-up, a motion was made for leave to appeal after the time for giving notice under the statute had expired, and Lord Justice *Rolt* said that it was “not enough to say that no inconvenience would be caused by the delay, or that the question to be decided was an important one; the object of the provision of the Act of Parliament is that matters may be speedily settled.” Here the delay—

(1) Law Rep. 5 Ch. Ap. 167.

(2) Law Rep. 5 Ch. Ap. 112.

(3) 37 L. J. (Ch.) 51. *WV(1867)271.*

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above ten months—has been very great, and the principle thus stated applies. The object of the Act, which was to insure the early settlement of the claims of creditors, would be entirely defeated if such a delay was allowed. An analogy is furnished by the ordinary practice observed in applications for extension of time. In putting in answers, and other matters of a like sort, such an application is not granted unless it is made before the period at which the thing required to be done has actually elapsed. So in Bankruptcy, the uniform rule appears to be that the application for an extension of time to do a certain act must be made before the time ordinarily allowed for doing it has expired.

Then as to the main point in the case, *Kellock's Case* (1) lays down the principle which is exactly applicable here. The engagement of the bankers here was absolute, to accept the bills, and they were not entitled to have the benefit of the proceeds of the cotton until those acceptances were honoured. Now, in some instances they have not even accepted the bills drawn upon them; in others, where they have given their acceptances, the bills have not been paid. In no way whatever, therefore, have they established a claim to have the value of the cotton credited to them. What are the facts here? *Attwool* was a person who wanted to speculate in cotton; he desired the house in *Pernambuco* to send him large consignments of it. The Respondent in this country, and his partners at *Pernambuco*, were unwilling to do this without some security beyond that of *Attwool* himself. *Attwool* obtained from the bankers a letter of credit. On certain conditions, the bankers were to have the shipping documents of the cotton; but they have not fulfilled those conditions, and are not, therefore, entitled to the cotton. The bills were to be drawn "against cotton," and the bill-holder is entitled to hold the cotton until the bills drawn against it have been accepted and paid. This was a plain hypothecation of the cotton to secure the bills. Till they are paid the bill-holders may prove for the whole debt against the banker's estate. The only restriction upon the bill-holder's right to do so is that he shall not receive more than 20s. in the pound. To that amount the bankers are under a clear obligation to satisfy him, and he is entitled to the whole benefit of his security till they have done so,

(1) Law Rep. 3 Ch. Ap. 769.

and in the meantime to prove against their estate for the full amount of his claim. The terms of the letter of credit fix this absolute liability on the bankers, and shew, too, that the cotton is to be the security for its performance. The bills are to be "drawn against cotton," a phrase which gives to the holder of the bills so drawn—and who has notice of the letter of credit, which of course he must have since the bill itself refers to it—a right to the security of the cotton. The undertaking of the bankers is not merely to accept the bills, but to pay them: "We engage to honour such drafts to the extent named;" a positive and unconditional undertaking. The form of the letter of credit entirely distinguishes this case from that of *Coupland* (1). In that case the stipulation was, "the bills of lading for cotton to be given up to us on our acceptance of the drafts." There is nothing of the sort here, but there is a positive engagement "to honour the drafts," which engagement has not been kept, and the cotton being the something against which the bills are to be drawn, the cotton is to be the security for the payment of the bills. After that, the bankers cannot be heard to say that they are entitled to keep the cotton to themselves, and to have its value set off against liability on their unperformed undertaking. [LORD CAIRNS referred to *Ex parte Waring* (2).] The bankers here became, in fact, sureties for the payment of the bills with which *Attwool* bought the cotton. They have not discharged the liability they have thus incurred, and they can have no title to the cotton till they have discharged it. *Johnston* is clearly entitled to prove against the assets of the company for the whole amount of the acceptances.

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At the close of the argument on behalf of the Respondent

THE LORD CHANCELLOR (Lord *Hatherley*) said:—

My Lords, I do not think it will be necessary to hear any reply. We have already intimated to Sir *Richard Baggallay* that if we should decide in his favour with regard to the first order, then with regard to the two subsequent ones we should simply discharge them, and not direct, as regards those two orders, any repayment of costs.

(1) Law Rep. 5 Ch. Ap. 167.

(2) 2 Rose, Bank. Cas. 182; 19 Ves. 345.

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Prefacing the observations I have to make with that remark, I shall call upon your Lordships to concur with me in reversing the first order of the 17th of March, 1869, made by the Master of the Rolls, whereby Mr. *Johnston*, the Respondent, was permitted to prove for the full amount of the bills in question, and, as regards that order, to direct the refunding of any costs, if any were paid. Then to reverse the two subsequent orders without any direction as to costs, and to remit the case back to the Court below with a declaration that the Respondent is entitled to prove under the winding-up order for the £3300 only, that being the admitted balance remaining due to him after application of the proceeds of the cotton.

The whole case turns upon a very simple state of facts. It turns, in fact, upon the terms of a letter of credit given in the case of a person named *Attwool*, there being another letter of credit in the same form with regard to certain other transactions by different persons. The letter of credit is addressed to the firm of *Johnston, Pater, & Co.*, at *Pernambuco*, a firm with which the Respondent was in connection. It is to this effect:—[His Lordship read it (1).]

The transactions out of which this letter of credit arose are of a very ordinary character, as we have been able to learn from numerous cases brought before the Courts with reference to mercantile engagements in the purchase of cotton abroad. Mr. *Attwool* was minded to make purchases of certain cotton abroad, and he entered into engagements with *Johnston* at *Liverpool*, *Johnston* being a member of the firm abroad, and acting as agent here for it. *Johnston* made an arrangement with *Attwool* that he would procure the cotton which *Attwool* was to purchase. That being so, *Johnston* had an easy mode of proceeding, if he had so thought fit, by himself furnishing the funds, either by bills or cash, for the purchase of the cotton, and then ordering that the whole of the cotton should be transmitted to him, and he would then have held the direct security of that cotton so transmitted. Instead of that, it was more convenient to him to avail himself of the credit in which *Barned's Bank* stood at the time, and to procure from the bankers an undertaking on their part that they would honour bills

(1) See *ante*, p. 158.

which should be drawn by the house at *Pernambuco*, by means of which the cotton might be purchased out there by the discounting of these bills. Instead of taking the whole transaction in his own hands, he made this arrangement with the bankers by which they were to give this letter of credit, and to protect themselves by having the consignment of cotton made to them with the proper documents of title.

My Lords, I apprehend that when that was done the bankers were in this position: They had entered into an arrangement to pay the bills so drawn, and *Johnston, Pater, & Co.*, at *Pernambuco*, were to send the cotton, in respect of which they were to have the cash furnished by discounting the bills. And those goods so sent were to be in the hands of the bankers for the purpose of paying the bills which they had agreed to honour. As things then stood it would have been quite hopeless for any person, being a holder of those bills, to take any step or proceeding as against the bankers, to prevent their availing themselves of the security which they held, in order to place themselves in funds to meet the bills when they became due. In other words, no holder of any of those bills, if he had been told that the bankers were going to sell the cotton, could have filed a bill for an injunction to restrain them from so doing. As regards *Attwool's* transaction, we have not the distinct evidence that we have in the other case; but as regards *Baines* we have distinct evidence of that being the nature of the transaction, because in a letter written in *Baines'* case it was expressly said that the bankers were to have the consignments made for the express purpose of keeping them out of cash advance. Of course they could only be kept out of cash advance by being able to realise before the bills should become due.

My Lords, the only argument which has been raised, or which could be raised, in this case, was founded on those very few words in the letter of credit:—"You are hereby authorized to value on this bank in such sum or sums as may be convenient to you, not exceeding in the whole the said sum of £10,000, in drafts at ninety days' sight, against cotton purchased in conformity with the letter of instruction." The whole argument for the Respondents has been founded on those words; Mr. *Jessel* saying, and Mr. *Fischer* following him in that contention, that those words "drawn against

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cotton," would give to all the holders of the bills, who had notice of the letter of credit by the reference contained in the bill to "Credit No. 20" (which means this letter of credit), notice that those bills were drawn expressly against this particular cotton, and that they would by those means acquire a right against the cotton.

Now observe what that argument amounts to. If that be the doctrine of the Court of Equity, which I venture to say it has never yet been affirmed to be, notwithstanding the many attempts made at different times by parties, interested in bills of this description, to obtain injunctions to prevent the disposal of goods against which the bills were supposed to be drawn,—or, in other words, to acquire a distinct lien over the goods by that means,—the result would be that in the case of every one letter of credit of this kind, the bankers giving it would be held to constitute themselves trustees for every bill-holder, whatever number of bills there might be, whether ten, or twenty, or fifty, or more, and they would be held bound, as trustees for the various bill-holders, to keep a separate account of the proceeds of the goods consigned to them by way of security. No one can doubt that in that case all bankers of good credit, dealing largely in these transactions, as most banks in *London* and *Liverpool* do, would, as a consequence, have a responsibility cast on them of a kind which would be enough to stop the business of any bank—namely, a responsibility to numerous *cestuis que trust*, who, one and all of them, might take alarm, and might think it desirable to file bills to prevent the bankers dealing with property which had been consigned to them for the express purpose of keeping themselves out of advance under the engagements into which they had entered for honouring the bills.

My Lords, that really is the whole case. There is nothing else in it—and the only question to be considered is whether such an equity exists. We know very well that the doctrine of *Waring's Case* (1) will raise that equity where it is necessary to be raised, in consequence of a double involvency, or an insolvency of both sides, in order that the one firm whose estate is being administered in bankruptcy may not be injured by another bankrupt firm get-

(1) 19 Ves. 345; 2 Rose, Bank. Cas. 182.

ting the benefit of the securities, whilst at the same time it cannot discharge the obligation it has incurred to pay the bills. But it is only in that case that the holders of bills or securities of this description have ever been held to be entitled to such an equity as is here asserted.

My Lords, I need not deal with the subsequent transaction. I think the subsequent transaction is wholly consistent with, though it does not in itself establish, an engagement between the parties that the property should be dealt with in the manner described, namely, that it should be a consignment made to these bankers as security to them for the repayment of the bills, and which they had a full right to avail themselves of for that purpose. The arrangement which was made after the winding-up order, and after the bill had been filed, was an engagement which seems to meet the true justice between the parties, namely, that these bills were to be cleared off, as regards the bankers, to the extent to which the property consigned would enable them to be cleared off, and the bankers were to be debtors to the holders of the bills simply for the surplus which would remain after the goods so consigned had been disposed of and applied in satisfying the obligations that the bankers had entered into. The holders of the bills are simply holders in that respect, and they cannot prove for anything more than the balance which remains after the goods have been sold and the proceeds applied according to the express terms in the engagement of the letter of credit. The parties having here agreed to the amount said to be over due in that respect, it will be unnecessary that your Lordships should enter into the question, which would otherwise have raised points of a different character, as to what was to be done with the remaining two sets of bills under the engagement with *Baines & Co.* The parties seem to have treated them as all standing on one common ground, although there were some important differences between them. But I think we may now put the order of this House in the form I have described, namely, to reverse the judgment of the Master of the Rolls, given in March, and if there were any costs paid, to direct them to be repaid.

Mr. *Jessel*:—There were not any paid, they were added to the debt.

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THE LORD CHANCELLOR:—Then to reverse the three judgments in the Court below, and to declare that the Respondent is entitled to prove under the winding-up order for the sum of £3300, the agreed balance, but he is not, as we declare he is not, entitled to prove for the whole, and to remit the case to the Court below with that direction.

I ought not to omit the question which was raised by Mr. *Jessel* as a preliminary objection to the hearing of this appeal, namely, that the appeal is out of time. That argument was rested entirely on the 124th section of the *Companies Act*, which gives a power of appeal within the period of three weeks, and says that that period shall not be exceeded unless the Court of Appeal shall “extend” the time. It appears to me that it would be a narrow construction of that Act, and one which the circumstances under which the Act was passed, and the magnitude of the questions which must have been foreseen as possibly arising under it, would not warrant, and one likewise which it would be impossible to hold in itself a sound construction of the Act, to say that the word “extend” must be taken to mean that the application must be made before the original time has elapsed, because the time having elapsed there is nothing remaining to extend. An argument was adduced in favour of that view from an ordinary rule of our Courts, namely, that where an application is made for an extension of time, the application must be made before the period of time has elapsed. That, no doubt, is so in cases of putting in answers, and such like. But there is this to be said with reference to that, that in Chancery the Court has all its own Orders and Rules under its own control; and, although, as a rule, it would say that the application ought to be made before the actual time has run out, yet case after case has occurred where, on payment of the costs, which the parties are always made to pay on such occasions, the Court, having its Orders under its own control, has extended the time and allowed the matter to be entered into. Mr. *Jessel* also rested very much on the course taken in Bankruptcy; but I do not think that turns in any way upon the words of the statute being in the same form as they are here. What we have to look at in substance is this: Is it contrary to the meaning of the word “extend” to give longer time after the original time has passed? Time is not a material with respect to

which it may be said that the matter itself having ceased, there is no farther subject to operate upon. Although the time has passed, it may well be that the Legislature intended to say there should be a power in the Court of Appeal to say that it would be reasonable that an additional time should be given. When we think of the difficult subjects that are likely to come before the Courts under the *Winding-up Act* it seems impossible to conceive that the Legislature could have thought it desirable to impose a peremptory prohibition against any extension of the time, on a consideration of all the circumstances that may have occurred after the period of three weeks has elapsed. I mentioned one class of cases to Mr. *Jessel*, in which I was pretty sure some such leave had been given, namely, a class of cases where a decision had been come to in the Court below which had afterwards been reversed either by the Court of Appeal in Chancery or by this House. I think I also remember another instance besides that, of which Mr. *Jessel* also seemed to have some recollection. I think that in *Ship's Case* (1), after the appeal was heard and decided, several other cases depending upon *Ship's Case* were allowed to be appealed. I have, therefore, no doubt that it is competent to the House to extend the time, as it was done in this case, by the Order of the House confirming the decision of the Appeal Committee to extend the time.

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LORD COLONSAY :—

My Lords, I am of the same opinion which has been expressed by my noble and learned friend on the woolsack. It appears to me, on looking at the terms of this letter of credit, and considering the facts of this case, that these bankers directly stipulated for the delivery of these shipping documents with a view to their own security ; and I think that the Respondent is only entitled to prove for the balance that remains after applying the proceeds of the cotton to the extinction, as far as possible, of the debt due to the banking company. I am, therefore, of opinion that the orders complained of must be reversed.

LORD CAIRNS :—

My Lords, upon the question of the time within which this appeal has been brought, I think there can be no doubt at all

(1) Law Rep. 3 H. L. 343.

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that it was *intrà vires* of this House to allow the appeal to be presented at the time at which it was, and the House has made an Order expressing an opinion that the appeal ought to be so presented, and giving leave for the admission of the appeal. The argument against the jurisdiction of this House, that if the time be extended, it must be extended within three weeks after the order of the Court of Chancery is made, and cannot be extended afterwards, if it were to prevail, would, in cases under this statute, reduce to impotence the jurisdiction of this House during about one half of the year; because, as to one half of the year, or, at all events, one half of the judicial year, it probably would not be in the power, or would rarely be in the power, of the suitor to come and ask for the leave of this House within three weeks after the order of the Court of Chancery is made. Take the case of an order made early in November. It would be perfectly impossible to obtain the sanction of the House within the three weeks to extend the time for presenting the appeal. In truth, my Lords, it is entirely a narrow construction of the word "extended" to say that extension of time must be made within the period of time first allotted. The time may be extended just as well after the three weeks have expired as before. The argument assumes that the Act of Parliament is worded in this way: No appeal shall be brought except within three weeks, unless the Court of Appeal sanctions, within the three weeks, an extension of time to a longer period. But it is not so framed. I think, therefore, that the appeal is altogether in time, having regard to the order that has been made.

Now, my Lords, upon the merits of the appeal, I certainly concur in the view of my noble and learned friend, that this case does not depend upon a careful construction of the previous authorities, some of which have been cited at the Bar; but that it depends upon the construction of one, or perhaps two, very simple documents, the construction of which seems to admit of no doubt whatever. We have to deal here with what are called in the commercial world letters of credit. Now, it must be borne in mind what is the object of the parties in resorting in a case of this kind to a letter of credit. A gentleman of the name of *Attwool*, in *Liverpool*, wants to buy some cotton at *Pernambuco*.

In the ordinary course of things he would write out to persons at *Pernambuco*, and request them to buy the cotton, and to draw bills on himself for the price. What is the reason that that is not done here? What is the reason that that is not the form resorted to, and that Mr. *Attwool* does not write out to *Pernambuco*, saying to the cotton merchants there, Buy the cotton for me, and draw your bills upon me, if you like, and attach the shipping documents to the bills, and I will accept the bills when they come home; that is the transaction I wish to enter into? Why was not that done in this case? The reason why the parties did not wish to do it is this: Mr. *Attwool* may be a most respectable and solvent person—I am far from saying that he is not—but at the same time it is thought desirable that there should be some name brought into the transaction for the purpose of using it in the *Pernambuco* market, some name perfectly well known there, whose credit is such as that every person would accept it, provided only you can assure the merchant to whom you want to offer the bills drawn on that person, or that body of persons, that the bills will be accepted when they get home; provided, that is to say, that you can assure the merchant to whom you offer the bill that you have got authority to draw on the person at home on whom you draw your bill. Well, how is that to be accomplished? There was a bank at *Liverpool*, which had at that time a great reputation, *Barned's Bank*, and Mr. *Attwool* knew that if he could get a letter from *Barned's Bank* saying that these bankers would accept the bills when they came home, he could send that letter to his correspondents at *Pernambuco*, and they would be able to shew it to any merchant to whom they might offer the bills to pay for the cotton; and the letter of credit, so shewn, would be a certificate that the bills would be accepted when they came home. Those bills would then be taken on the *Pernambuco* market like bills that had been actually accepted, because a promise by a house of high credit to accept bills would be taken as equivalent to actual acceptance, and the bills would pass as current as if they were accepted bills. That is the whole object of the transaction.

But then the letter of credit, given, for the use of *Attwool*, to the *Pernambuco* house, which was to pay for the cotton, must accomplish two things. It must contain an undertaking—to be shewn to

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those to whom the bills are offered—to accept the bills when they come home; and it must also contain, on behalf of the bankers, for their own protection, orders to those who are dealing with the cotton, as to how they are to send home the shipping documents relating to the cotton, in order that the bankers may be protected for the acceptance which they have promised to give; and the whole fallacy of the argument of the Respondent consists in confounding the two arrangements, which are perfectly separate in their nature, namely, the arrangement or promise to accept the bills, which promise is to be shewn to the parties selling the cotton, to whom the bills are offered, and the order from the bankers to those dealing with the cotton at *Pernambuco* to send home the shipping documents. The order to send home the shipping documents, and the condition annexed to the promise to accept—that the shipping documents shall be sent to them—are for the protection of the bankers, and not, as it seems to me, in any way for the protection of the persons who negotiate the bills of exchange.

Of course, we know perfectly well that, upon the principle of *Waring's Case* (1), if both the drawer and the acceptor of the bills under those circumstances become bankrupt, then the holders of the bills are entitled to stand upon what is called the equity of the drawer with reference to any security which may have passed between the other parties to the transaction. But it has always been most carefully said that that right is not a right founded on contract; it does not spring out of the contract, but it springs out of the necessities connected with the administration of the two insolvent estates. There is, therefore, no right whatever on the part of the persons who, in the *Pernambuco* market, took the bills of exchange, to do more than to require that the bankers here shall accept the bills; and if they are accepted, the holders of the bills no longer have any security over the cotton; that cotton passes into the hands of the bankers themselves.

My Lords, I entirely concur in what my noble and learned friend has said—that if we were to hold that bankers in the position of *Barned's Bank* were, under such circumstances, to be constituted trustees for all the bill-holders, and were obliged to open separate accounts for all the proceeds of the cotton, and to hold those

(1) 19 Ves. 345; 2 Rose, Bank. Cas. 182.

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proceeds to be ear-marked for the payment of the bills, it would have the effect of suspending all commercial transactions under circumstances of this kind. It appears here, from the very numbers assigned to the letters of credit, that *Barned's Bank* issued them very largely. Of course, we know that it is always the case that many letters of credit are issued, and it would be impossible for bankers to conduct their business if each letter of credit was to give rise to a separate trust account.

I, therefore, entirely agree in the motion submitted to your Lordships, that the order of the Master of the Rolls of the 17th of March, 1869, should be reversed (which will settle all question of costs under it, for the costs are added to the debt up to that date), and that the other two orders should be reversed; and, lest there should be any doubt upon that point, that we should direct that there be no re-payment of any costs paid under those orders.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, the motion I have to make is that the two orders of the Master of the Rolls and the order of Lord Justice *Giffard*, appealed from by this appeal, be reversed, but without disturbing any payment made thereunder in respect of costs; and that it be declared that the Respondent is entitled to prove under the winding-up order for the sum of £3300 only, being the admitted balance remaining due to him after the application of the proceeds of the cotton in the proceedings mentioned towards the payment of his debt; and remit the case to the Court below to be dealt with according to this declaration.

Orders reversed with directions and declaration, and cause remitted.

Lords' Journals, 19th May, 1871.

Solicitors for the Appellant: *Freshfields.*

Solicitors for the Respondent: *Sharpe, Parkers, Pritchard, & Sharpe.*

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 May 15, 16, 23. — AND
 JEAN BOS AND PHILIPPE DUBOURCQ—
 THE INTERNATIONAL LAND COM-
 PANY, LIMITED—AND THE GENERAL } RESPONDENTS.
 COMPANY FOR THE PROMOTION OF
 LAND CREDIT, LIMITED . . . }

Companies Act, 1862—Foreign Company—Registration.

Where the requisite number of persons and the requisite forms of application are presented to the Registrar of Joint Stock Companies under the provisions of the *Companies Act, 1862*, though the persons applying for registration of a company may be foreigners, and though there may be many circumstances tending to shew that the company sought to be registered is, in several respects, a foreign company, he is not bound to refuse it registration.

If there are in it shares in conformity with the statute, though there may be others of a different kind, and though the principal business seems likely to be transacted abroad, he may still grant it registration.

A company having many of its shares transferable by delivery, but having also many "nominative shares," i.e. shares which are the same as the ordinary joint stock shares in companies in this country, applied for registration. The seven shareholders who made the application were all resident abroad, and the first directors nominated were foreigners, and only one of them appeared to have even a temporary residence in *England*. The articles of association referred in several places to the English Law, and especially to the *Companies Act, 1862*. There was an office of the company in *Westminster*, but it was doubtful whether any general meeting was intended to be held in *London*, or other place in *England*. The Registrar granted it registration:—

Held, that he was lawfully entitled to do so, that he was not bound to refuse the registration, and that, the registration having been thus actually made, the usual legal consequences of registration arose:

Held, therefore, that if the circumstances occurred which, by the *Companies Act, 1862*, s. 79, were such as, in the opinion of the Court, made it "just and equitable" that the company should be wound up, the Court might lawfully and properly issue the order for winding it up.

THIS was an appeal against an order made by Lord Justice Giffard on the 26th of February, 1870 (1), which reversed a previous decision of Vice-Chancellor Malins.

(1) Law Rep. 5 Ch. Ap. 363, *nom.* objects and means of the company are fully stated.
In re the General Company for the Promotion of Land Credit, where the

In the month of June, 1865, the *General Company for the Promotion of Land Credit, Limited*, was formed, and on the 24th of that month a memorandum and articles were registered under the *Companies Act*, 1862. The only articles important for the understanding of this appeal were the following: "A.—To procure the capital for any company, in any country, but particularly in the States of the *German Confederation*, formed for the purpose of carrying into effect any object based on land, such as companies formed for the purposes of agriculture, land credit, mortgages, and guaranties of or on real estate, and to issue the capital of such companies, and to subscribe for, purchase, and dispose of the shares, bonds, and securities of those companies, or any other securities on real estate, mortgage securities, bonds secured on real estate, or *lettres de gage*." The company also proposed to make loans on such bonds, to receive on deposit title deeds, to unite with or absorb any company, English or foreign, having for its object land or real estate; to manage state domains, the property and estates of communes, corporations, foundations, or of private persons, or act as stewards or receivers, or lessees, or tenants, and various other matters of the same kind. The capital was proposed to be £5,000,000, divided into 500,000 shares of £10, or 250 francs, each. The memorandum presented for registration was signed by seven persons, every one of whom was described as "*propriétaire*," and as resident at *Brussels*. The following articles are alone important to be considered:—Art. 2. "The expression 'nominative shares' shall mean shares upon which the scrip certificates as provided for by Art. 14, hereafter set out, have not been delivered." Art. 7. "The shares are nominative up to the period of delivery of the scrip certificates, as mentioned in Art. 14." Art. 12. "If several persons be registered as joint holders of any nominative share, any one of such persons may give effectual receipts for any interest or dividend payable in respect of such share." Art. 13. "Every member shall, on payment of such sum as the directors may prescribe, be entitled to a certificate under the common seal of the company, specifying the share or shares held by him and the amount paid up thereon." These certificates were to be capable of being converted into shares of £100 or £1000, and to be "reconverted into shares of £10 each, as and

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when their respective holders may demand the same." Art. 14. "The directors may issue to every holder of any share of whatever amount, on which one-half of the nominal amount has been paid, a scrip certificate to bearer in respect of such share, certifying that the holder of such certificate is the owner of the share and that 50 per cent. of the nominal amount of such share has been paid." Art. 21. "Every share in respect of which a scrip certificate in conformity with Art. 14 has been issued, can be transferred by mere delivery of such certificate." Art. 22. "Any person who shall have become entitled in any way other than by voluntary transfer, or allotment, to a nominative share, may, instead of being registered himself, elect to have some person, to be named by him, registered as the holder of such share, and shall testify such election by executing to his nominee a transfer of such share."

Upon the subject of meetings the 39th article directed that the first general meeting should be held in the course of the first six months of 1867, "at a time and place on the continent of *Europe*, or at *London*, to be appointed by the directors." Ordinary general meetings after that were to be held once in every year "at such time and place as may be appointed by the directors." Art. 40. "No member acquiring nominative shares by voluntary transfer, shall, by virtue thereof, be entitled to attend a general meeting until he has been registered owner of such shares for three months." As to voting, Art. 58 declared that "No holder of shares of a nominal amount of less than £400 shall be entitled to vote," and there was to be one vote for every share of £400. Art. 61. "If two or more persons are jointly entitled to a nominative share, the person whose name stands first in the register of members as one of the holders of such share shall alone be entitled to vote in respect of the same."

There was a list of the first directors of the company, only one of whom was described as "residing in *London*," and that director was "*Ernest, Comte de Doernberg*, Chamberlain to, and Captain in, the service of, His Apostolical Majesty the Emperor of *Austria*." All the other directors resided at different places in *Belgium*, *France*, and *Germany*. Local boards of directors could be appointed to meet "in such cities and towns as might be appointed by the principal board."

Among the other powers of the directors it was provided (Art. 85, C.) that they might "issue shares in money of the country, or foreign moneys, or determine the equivalent, in any foreign currency, of the nominal value of the shares, or the amount of any call, or any other sum of money, expressed in English currency." They were (Art. 85, D.) to do what "they might think fit for the purpose of facilitating the holding of shares in the company by persons resident abroad, and of maintaining and giving effect to the international character of the company." They were also empowered (Art. 85, H.) "to register or constitute the company as a *société anonyme*, or a corporation, or corporations, or co-partnership, according to the law of any foreign country," and (Art. 85, I.) "to exercise all or any of the powers of the *Companies Seals Act*, 1864" (27 Viet. c. 19). Notices of dividends were (Art. 128) to be inserted "in the *London Gazette*," and in any of the newspapers of several other capitals "to be selected by the directors."

The books of account were (Art. 132) "to be kept in such country and at such place as the directors shall appoint, and duplicates of these books, or such extracts or copies from them as the *Companies Act*, 1862, may require, shall be kept at the registered office of the company," &c.

As to audit, it was provided (Art. 145), that if no appointment of auditors should be made, according to the terms of certain articles, "The Board of Trade may, on the application" of members holding one-fifth of the shares of the company, appoint an auditor for the year, &c. As to law proceedings, it was declared (Art. 149), that "In any country where the law may so permit, the company may appear and defend, by the chairman of the board, or by a director specially delegated for the purpose," &c. Finally, it was provided (Art. 153) that "in the event of a dissolution, either on the expiration of the term or before this period, the general meeting shall nominate liquidators and determine their duties, in conformity with the enactments of the *Companies Act*, 1862, or any other statute in this behalf for the time being in force." This memorandum was signed by seven persons, described as holding 160 shares, all of whom resided at *Brussels*.

The registered office of the company was, at first, declared to be

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“situated at No. 30, *King Street, Cheapside, London*,” This was afterwards altered to “3, *Westminster Chambers, Victoria Street, S.W.*” Returns of shares of the registered shareholders were made under the *Companies Act*, 1862, which were stated to have been made by the agent resident at the registered office of the company. By the return for 1868, it appeared that there were only six registered shareholders, that they held 120,260 shares, while 170,740 shares were entered without the names of holders, but as being transferable by delivery as “shares to bearer.”

The *International Land Credit Company, Limited* (which appeared by this return to be the holder of 100,000 shares), claiming to be a creditor for a larger amount, and Messrs. *Bos* and *Duboureq*, directors of the *Banque Hypothécaire Néerlandaise, at Amsterdam*, likewise creditors to a large amount, presented petitions to have the company wound up. The two petitions were opposed by the Princess of *Reuss*, the holder of paid-up shares, twenty in number. The case was heard by Vice-Chancellor *Malins*, who dismissed both petitions on the ground that the company was a foreign company, which he did not think came within the operation of the *Companies Act*, 1862. This decision was, on the 26th of February, 1870, reversed by Lord Justice *Giffard*. Hence this appeal.

Sir *R. Palmer*, Q.C., Mr. *Cotton*, Q.C. (Mr. *Kekewich* was with them), for the Appellant:—

The registration here was erroneously made, and cannot give to the English Courts a jurisdiction over this company which the law never intended them to possess. The statute is an English statute, dealing with English transactions. The company was altogether a foreign company. Its directors, without exception, were foreigners, and only one of them was even said to be a resident in this country; while, from the description given of him, and of the office he held, which was an office requiring personal attendance upon the Emperor of *Austria*, it was clear that his *London* residence must have been of a temporary and very precarious nature. Then, again, the objects of the company were foreign, and, though there was a possibility, but only a possibility, that the first general meeting might be held in *London*, it was clear that all other general meetings, which were to be held at the place and

time agreeable to the directors, would be held abroad where the directors were resident. But more important still was the fact, that the shares, to the greatest extent of their number, were shares such as are not recognised in this country, namely, shares capable of transfer by mere delivery. These shares were incapable of registration, no one requisite of the statute could attach upon them, and therefore the company, the property of which consisted chiefly of such shares, ought not to have been registered at all. Assuming that the registration ought not to have been made, then, although made, the Court would have regard to the error of registering it, and ought to exercise the discretion vested in it by the statute, and to declare that it was not "just and equitable" (1) that the winding-up should be ordered.

The title of the Appellant to object to this winding-up could not be disputed. She was the holder of twenty fully paid-up shares, and those were all duly registered, being of that description of shares of which the minority was constituted; such shares being those alone which the law of this country recognised. These shares were what were called the "nominative shares," being those entered in the name of the holder, and capable as such of being returned as duly authenticated shares of the company. The other shares cannot be recognised here, and the possession of them cannot entitle the holders to appear as shareholders in an English Court of justice.

The *Companies Act* was not intended to apply to a case like this. It was meant for purely English companies. There are many statutes which, though, like this, using very general forms of expression, are, in fact, only applicable to English subjects and to English concerns. Thus, it was declared in *Jefferys v. Boosey* (2) that foreigners were not affected by the Copyright Acts, unless expressly named in them. In *Thomson v. The Advocate-General* (3), legacy duty was held not payable on personalty in this country where the testator died domiciled abroad. And in *Wallace v. The Attorney-General* (4) the same rule was adopted. Yet in all these cases English interests and English legal protection of property

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(1) 25 & 26 Vict. c. 89, s. 79,
sub-s. 5.

(2) 4 H. L. C. 815, 955.

(3) 12 Cl. & F. 1.

(4) Law Rep. 1 Ch. Ap. 1.

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were concerned, but the provisions of the English Acts did not apply. So far as to general principles.

Now, as to matters of the same kind as are to be dealt with here. In *Hyam's Case* (1) the shares in a Mexican Mining Company were, as most of the shares are here, payable to bearer, and though they were not on that account absolutely illegal, yet it was held that a transfer did not pass the property. Here not only were most of the shares payable to bearer, but there was a positive provision enabling the holder of nominative shares to change them into shares transferable by delivery, and also a provision enabling the holder of them to divide and subdivide them at his pleasure. Nothing could more completely shew the foreign nature of the company. The holders of these shares could not be subject to suits in the English Courts, except with reference to the nature of the contract into which they had entered, and to require them, for the purpose of making them liable, to hold the shares in any other way than the articles specified would be to overrule their contract. That could not be done. That principle was acted on in *Bunn v. The Electric Telegraph Company of Ireland* (2), where the shares were held incapable of being transferred, as the original nature of them had been disregarded, and the transferee put on the register without those formalities which the articles of the company required. In the *Natal Case* (3) a winding-up order was on such grounds refused.

The 23rd section of the statute describes who shall be members of the company, and they are all required to be entered on the register as such. That was impossible here, for the greater number consisted of persons whose names were not known, and who could transfer at any moment their rights and liabilities by the mere delivery of a certificate. Again, these articles [22] allowed a shareholder to put any person he pleased in his own place, while the 30th section of the statute rejected altogether trusts expressed or implied. The 18th section of the statute, when all its provisions and directions have been complied with, declares, upon that being done, but not until it is done, that the company is incorporated and capable of exercising the functions of an incorporated company.

(1) 1 De G. F. & J. 75. *Ames*

(2) 2 De G. F. & J. 275.

(3) 1 H. & M. 639.

That could not be done here, and the registration cannot have its full effect. It could only at the utmost incorporate one set of the members, and not the rest; but the intention of the Legislature was that all alike should be incorporated. If not all, then none. In the same way the 25th section of the statute, which required a full statement of existing and past members, and the 30th section which forbade the entry of trusts on the register, could not be complied with. In the *Madrid and Valencia Railway Company* (1), which was a case on the Winding-up Acts of 1848 and 1849, Vice-Chancellor *Knight Bruce* said: "On reading the prospectus I find this passage, 'the affairs of the company will be conducted by a board of directors in *London*, assisted by a highly-influential committee in *Madrid*.' As that was one of the stipulations under which the company was formed, it may, I think, be treated as subject to English, or, at least, not as exclusively subject to Spanish law," and on that ground alone he felt himself at liberty to grant an order for winding up. Here nothing exists of what he there thought constituted the foundation of his jurisdiction. So in the *Union Bank of Calcutta* (2), the like principle was applied, the Vice-Chancellor observing (3): "The company was established in *India*, and as an Indian company, but it has correspondents here, and very possibly in other parts of *Europe*, without which probably its business of a bank could not be transacted. That, however, does not render it necessary to act under the statutory jurisdiction, if it is not shewn that there exists in this country the means of doing substantive justice, or more good than harm by so interfering." Those cases laid down the principles by which the decision here ought to be governed. Here, all the duties of the directors will have to be performed abroad; all the arrears of the shareholders are arrears in respect of the anonymous shares; those shares themselves would not be recognised in this country; and, in fact, everything connected with the case is foreign. The Registrar could not, by the act of registration, which was a mistake in itself, give the company a legal *status*, which the Law had never intended to confer upon it. The registration here, being irregular and erroneous, cannot have any legal effect on the company. Such was the

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(1) 3 De G. & Sm. 127.

(2) 3 De G. & Sm. 253.

(3) 3 De G. & Sm. 257.

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rule laid down with respect to the Joint Stock Companies Acts of 1856 and 1857, in the case of *Re Northumberland and Durham District Banking Company* (1), where Lord Justice Turner said: "If this company was not authorized to be registered, I take it to be quite clear that the certificate of registration can be of no avail."

It would not be "just and equitable" to direct the winding-up of this company, when it is perfectly clear that the decisions and proceedings of our Courts, in the case of a company like this, so essentially foreign in its origin, nature, and objects, will not be recognised by foreign tribunals. All the objects sought for here can best be obtained by applying to those tribunals.

As to what are causes to be treated as rendering it "just and equitable" to wind up a company, the case of the *Anglo-Greek Steam Company* (2) may be referred to.

Mr. Glasse, Q.C. (Mr. Waller with him), for the Respondents *Bos* and *Duboucq*; and Mr. Fry, Q.C. (Mr. Lindley with him), for the *International Credit Company*:—

If the granting of this order to wind up the company is to depend on the discretion of the Court, the Respondents are entitled to every favourable consideration, and the order must be confirmed. They dealt with this company on the footing of its being an English company in virtue of the registration which it had obtained. The Appellant herself is a registered shareholder, and possesses rights as such. In that character she contracted. Yet she now puts forward the whole proceeding as a sham used for the purpose of misleading others by pretending to get the benefit of a recognised *status* in the English Law, and so taking advantage of English creditors. The circumstances are such, that if the Court of Equity has jurisdiction in the matter, there is enough to require its jurisdiction to be exercised in order to secure to the creditors what is "just and equitable."

The English creditor can only get at the property by the winding-up order. The only corporation in existence is here: it has no other domicile. There is no place of acknowledged business but in *London*, and that place is, by the act of these persons, put upon the register. Foreign tribunals will recognise in this case

(1) 2 De G. & J. 357.

(2) Law Rep. 2 Eq. 1.

the proceedings of our Courts: *Lindley* on Partnership (1). By the conventions existing between *England, Belgium, and France*, the power and acts of our Courts, founded on these statutes, will be enforced in those countries. And, even without convention, the American Courts have held in many cases (2) that they will recognise and act upon the judgments of foreign Courts, and of course will do so with relation to a winding-up order made by an English Court. Where the orders of English Courts can be enforced, it is *ex debito justitiæ* to grant the means by which effect may be given to them. The objects of this company are not exclusively foreign. The advances of its money are to be made on land anywhere, and there are many expressions in the articles which shew that property in this country was intended to be acted on. In the *Commercial Bank of India* (3), such a circumstance was held by the Master of the Rolls sufficient to warrant him in making the order for the winding-up. In the *Natal Case* (4), the order for winding up was only refused because there was but a small body of shareholders; and there was no such difficulty in the case as to call for the interference of the Court. And in the *Union Bank of Calcutta* (5) the winding-up order was in like manner refused solely on the ground of expediency. Those reasons are heré strongly in favour of making the order.

Unless the memorandum of registration is informal and bad, the registration is lawful and valid. The requisite number of persons applied for the registration—an English domicile was given for the company, many of the articles have English procedure in view, and this very *Companies Act*, 1862, is itself frequently referred to in them. In short, all the requisites for the registration were presented to the Registrar, who could not refuse to register the company. He had no legal-ground for a refusal, and if he had refused would have subjected himself to a proceeding by *mandamus*. It is no answer to what has been done to say that there was no intention to have the management of the company in *England*. If so, a false pretence was held out, and if on that

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(1) Page 1428.

(2) Bennett & Heard's Dig. tit. "Corporation," XI., vol. i. p. 314; and tit. "Judgments," VI., vol. ii. p. 144.

(3) Law Rep. 6 Eq. 517.

(4) 1 H. & M. 639.

(5) 3 De G. & Sm. 253.

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account the registration is irregular, the persons who occasioned that irregularity cannot take advantage of it, and certainly cannot do so against creditors who have been misled by those very means.

Mr. *Townsend*, and Mr. *C. Hill*, appeared for the *General Company for the Promotion of Land Credit, Limited*, but were not heard.

Sir *R. Palmer*, in reply:—

It is not because the petitioners for the winding-up are creditors, that the rules and forms of law are to be disregarded. They would be paid abroad—and not the sooner for getting this order for winding up—for foreign Courts will not as of course recognise this English decision, or admit this to be a corporation. That has been decided in *Belgium* in the case of one of these Respondents, the *International Company*, which the Belgian Court refused to acknowledge as a corporation.

Mr. *Lindley*:—Not quite so. The Belgian Court confined its refusal to the recognition of it as an English company with limited liability only.

Sir *R. Palmer*:—In making this registration the Registrar did not exercise judicial discretion. He was merely a ministerial officer, and the registration only attested that there had been a form of registration, but it did not pretend to make the thing registered a corporation.

That part of the statute which relates to the Enforcement of Orders (sects. 120 *et seq.*), shews that the enforcement in English Courts was the only thing thought of. The business of the company is to be performed abroad, and, in fact, no business has been done in this country. [LORD CAIRNS:—Would not the admission of English shareholders in a company registered in *England* give to the English Courts the jurisdiction to interfere?] It might, if the business of the company was carried on here, but that was not the fact. [LORD CAIRNS:—Suppose a company formed to work mines in *California*, might that not be an English company, though all the work was to be done abroad?] The management might be in *England*. That is not the case here. [LORD CAIRNS:—How

does that appear?] By the fact that all the directors were resident on the continent.

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THE LORD CHANCELLOR (Lord *Hatherley*) having stated the nature of the case, said :—

Two grounds have been principally urged before us with reference to the appeal. One ground, I may say the principal ground, was, that the company was in effect not such a company as was authorized by the Act of Parliament to be enrolled at all—that in truth it was not a company which had been incorporated by that Act, because it was incapable from its constitution of being considered a proper subject matter for the Act in any manner to operate upon. It was also said, that even if that was not so, such were the nature and character of the company that it was not a company as to which the Court should take upon itself any jurisdiction whatsoever, but that it should leave the parties in the position in which they found themselves, regarding the company as one which, if established at all, was not established in conformity with the view, and purport, and object of the Act of Parliament.

My Lords, the company certainly is one of a very singular character, and the structure of the deed of association is one which is extremely unusual with regard to any joint stock company intended to carry on business as a company of limited liability. In the first place, the scope of the company embraces a very wide field of action, because it was intended to be a company for the purpose of dealing with land generally, by way of advancing money on mortgages, and managing and buying and selling land, not only in this country, but all over the surface of the globe.

That being the general scope of the company, I think I may at once proceed to say what the articles of association are; and then take occasion to notice, in considering the deed of the company, what the principal objections are which have been raised to the formation of this limited company as a company acting in *England* and registered under the *Companies Act*, 1862.

The memorandum of association is in form in perfect conformity with what is prescribed by the Act of Parliament. It is in the proper form, and it is executed by seven persons, the prescribed number of intending shareholders; but all of them are resident

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abroad. The memorandum of association, in the third clause, says that the object is to be that of procuring capital for any company in any country, but particularly the states of the *Germanic Confederation*, formed for the purpose of carrying into effect any object based on land, such as companies formed for the purpose of agriculture, &c. I need not read the different purposes for which the company might deal with land. Suffice it to say that it includes almost every form in which land may be dealt with through the medium of money. Under a sub-section, D, it is proposed that the company shall act as manager, or direct the management, of state domains, and of the property and estates of large proprietors, and do everything that may be necessary for that purpose.

My Lords, that being so, as far as the form of the memorandum of association goes, there does not appear to me to be anything on the face of the memorandum which prevents the company being registered under the Act of Parliament, because it is in the form prescribed, signed by the number of persons prescribed, and stating the number of shares which they hold; and the mere circumstance that the seven persons who applied for the registration lived at *Brussels* would not, in itself, necessarily operate to prevent the operations of the company from being carried on in *England*, if such were the object and purport of the association.

My Lords, when we come, however, to the deed itself, it is one undoubtedly of a very singular character for the purposes alleged to have been intended by those who registered the company under the registration provisions of the *Companies Act* of 1862. The second clause interprets what is meant by certain descriptions of shares, which are distinguished from other shares of the company. That interpretation clause tells you that "nominative shares," of which we shall find mention in the memorandum, are to mean "shares upon which the scrip certificates as provided for by Art. 14, hereafter set out, have not been delivered." Therefore, at the outset, you are informed that there are two classes of shares—the one to be called "nominative shares," and the other to be called shares on which scrip certificates will be given, and which are specified more particularly thereafter. I think I need not notice the other clauses until I arrive at Clause 6, which says: "Any person having signed the memorandum of association, or an application in

such form as the directors may determine, shall be deemed to have accepted the number of shares allotted to him in pursuance of such memorandum or application, and to have adhered to these presents." Then the 7th clause, which is an important one, says: "The company may, at the period of the subscription, receive such amount by way of deposit as they think fit, and may, also, from time to time, make such calls upon the members in respect of all moneys unpaid on the shares as they may think fit; provided that the holders of shares of the first issue shall not be liable to pay more than 50 per cent. on the nominal amount of their shares before the 1st day of January, 1873." These articles were registered, I think, in 1865, and that date of 1873 seems to have some reference to a singular clause afterwards found, by which certain foreign directors are made directors of the company for seven years. Then come these words at the end of Clause 7: "The shares are nominative up to the period of delivery of the scrip certificates mentioned in Article 14."

My Lords, I may now state at once that these nominative shares are shares in the ordinary sense in which undoubtedly the word "shares" is used throughout the *Companies Act*, 1862. They are shares taken in the proper manner, entered on the register, and registered in the proper form, and they will be shares of the same sort as are the shares of every other company taken up by several shareholders, and dealt with in the usual manner prescribed by the *Companies Act*. They are thus entirely distinguished from those scrip certificates which are mentioned in Art. 14. Every share, until it becomes the subject of a certificate under Art. 14, is to be a nominative share. Then there are directions as to the money which shall be paid upon these shares. By Clause 13, it is directed that "every member shall, on payment of such sum as the directors may prescribe, be entitled to a certificate" in the usual form, certifying what he has paid up:—[His Lordship read the whole of the 13th and 14th clauses, see *ante*, pp. 177-8, and then said:—]

Now, my Lords, having got so far as that, I may at once say, without reading in detail all the portions of the clauses of these articles of association which relate to the different shares, that we have the shares divided into two great classes—the one class, called nominative, which are just like any other shares in any other

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company, and the other set of shares are those in respect of which, 50 per cent. having been paid, the owner is to be entitled to have a certificate which would enable him to pass the shares to bearer as provided by Clause 21, which says: "Every share in respect of which a scrip certificate in conformity with Art. 14, has been issued, can be transferred by mere delivery of such certificate," whilst, upon the other hand, all the nominative shares are to be transferred in the usual manner, passing to executors or to assignees in bankruptcy, and so on in the usual way, or passing by voluntary transfer, as it is here called, though that voluntary transfer cannot be made without the concurrence of the directors. There is a clause giving that direction, but at the first starting it is unknown, of course, what shares will be of the one class, or what shares will be of the other; or, rather, at first starting, every share is nominative until the contrary is shewn by the person paying 50 per cent. and obtaining a certificate of this description. And although I do not think it very important, in the view which I take of this matter, to come to a distinct conclusion upon that subject, the impression upon my own mind would certainly be, that under the whole of this deed the directors would be entitled if they so thought fit (I need say no more), upon any person applying for shares, and at once paying down 50 per cent., to issue these certificates without putting him in the intermediate stage of being a nominative shareholder. It appears to me that it would not be absolutely compulsory upon the directors under this deed—if nothing in the Act of Parliament or the law interfered to prevent that from being done—there would be nothing in the deed itself which would make them guilty of a breach of trust, if, upon the application of a person for shares, instead of issuing him a nominative share, they told him that on payment at once of 50 per cent. upon the amount of his shares he might have this scrip certificate, which could be transferred from hand to hand instead of being transferred, as would be required in nominative shares, by passing it by deed, and, before so passing it by deed, obtaining the directors' consent so to do.

My Lords, I need not notice anything more in the deed beyond this, that the place for general meetings of the company is mentioned in Clause 39, by which the first general meeting may be in

London, or in one of several other places, at the pleasure of the directors. I merely notice that, although *London* is pointed at in that particular clause, evidently there is a power in the directors of directing from time to time the meetings to be held wherever they shall think proper, and these meetings when so called by the directors might be held in *London*, or in any other place they might think fit.

Then there is a clause which is of a very singular character, and which I have just glanced at before, Clause 76, in which certain gentlemen, who certainly have very little to do with this country, and who are very little likely to have much to do with it, are named as directors for the first seven years after the registration of the company—I suppose subject, of course, to accidents of various kinds that might remove them. I need not go through all their names, but the first one is the chamberlain to His Majesty the King of *Bavaria*, residing at *Ratisbon*. Then comes a certain Count *Doernberg*, who is chamberlain to, and captain in the service of the Emperor of *Austria*, and is described as residing in *London*; but he is the only person who seems to have had even a temporary connection with this country, though from his office of chamberlain to the Emperor of *Austria* I do not suppose it is likely that he would take up his permanent residence here. All the others are persons residing abroad.

My Lords, in that state of things two objections are taken altogether to the existence of this company as a company capable of being registered in *England*. It is said that the Act of Parliament has no relation whatever to any company formed in such a manner as this, and placed under such direction as that under which this company existed. Farther, it is said, with reference to the mode of the transfer of the shares, that the Act of Parliament did not refer to any company which proceeded to deal with the transfer of the shares in such a mode as is contemplated by this deed, namely, by creating shares that were to pass from hand to hand. Certainly the Act of Parliament does not seem to contemplate any course of proceeding by which persons should have all the benefit of a limited company, and at the same time of a company in which the liability should be transferred from moment to moment, as the shareholders thought fit, without any of the process which is

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pointed out by the Act of Parliament, namely, registering the shares, by placing them upon a register by reference to which any person inclined to trust the company might have an opportunity of seeing, in the registered persons, who were the persons to be trusted. As regards those certificated shares, there is great doubt as to how far such a company as that, so formed, could be held to be acting consistently with the Act of Parliament. But, on the other hand, we must take into consideration what is the constitution of the company when registered, independently of what may be the course of action and proceeding after registration, whether such course of proceeding be or be not in conformity with the Act of Parliament.

I apprehend that when these persons applied to be registered it might possibly have been competent, for anything I know (it is not necessary to say more on the subject), for the Registrar to raise an objection to the form of this deed, and to consider whether or not the certificate of registration should be issued. But, on the other hand, he had this—he had what the Act of Parliament required—he had a memorandum of association signed by seven persons. He had a regular office pointed out in *London*, which was to be the domicile (if I may so call it) of the company, which seems to be glanced at by the Act of Parliament, if not absolutely required; and he had also the fact that there were shares to be transferred in the manner in which the Act of Parliament requires that shares shall be transferred, namely, these nominative shares. He had farther before him the fact that every share was to be nominative until 50 per cent was paid. Therefore, up to a certain time, at all events, there was no reason why conformity with the Act of Parliament should not continue; and, in fact, there was nothing to say that it might not continue during the whole existence of the company. In that state of things ought he to have taken upon himself to decline to register the company? I think it would have been a very hazardous course for him to take, and one which, at all events, he was not necessarily called upon to take.

The company having been thus formed and registered, did enter upon its books certain nominative shareholders, amongst others the present Appellant, the Princess of *Reuss*. All those shares happened to be fully paid up shares—so it is stated in the case—

the shares are all entered as shares fully paid up. But the directors of this company in making their regular returns, as they seem to have done for two or three years at all events, mentioned so many shares with the names which were given in the returns, and a very large number of shares, constituting the majority of the whole number, was sent in as being shares held by certificate, and not, therefore, with any name thereto attached. These latter were, therefore, shares entirely contrary, at all events, to the spirit of the Act of 1862. Whether or not any notice should have been taken of such a state of things is, again, not a matter necessary to be inquired into. All we have to ask ourselves is this, my Lords: Has this company come into existence—has it been born? If it has been born, I think with regard to another question there can be no doubt, namely, that it ought to be, as speedily as possible, extinguished.

The question is, therefore, simply whether it has been created. If created, there is no power given in this Act of Parliament, nor in any other Act of Parliament that I am aware of, by which through any result of a formal application, like an application by *scire facias* to repeal a charter, the company can be got rid of, unless it can be got rid of by being extinguished through the effect of the Act of Parliament which provides for the winding up of companies when they ought, from any circumstances whatsoever, to be wound up. But your Lordships will remember that, in addition to various other specified causes for which a company may be wound up, it may be wound up when the Court shall, for any reason, think it "just and equitable" that it should be so wound up (1). That question as to its being just and equitable has reference, of course, to what is just and equitable in a judicial point of view, regard being had to all the circumstances of the case.

What, then, has taken place with regard to this company? The application is by Petitioners with whom a considerable debt has been contracted. It is quite true that we have not any distinct evidence as to the contracting of the debt. That seems to be left in a very unsatisfactory and imperfect state. But there is no denial of the existence of the debt, though we have no evidence in substance whether it was contracted *de facto* in this country by

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engagements entered into here or not. But the company had a name, it stood upon the register, it was formed by persons claiming to have a right to form it, under the Act of 1862, and going through all the forms which were essential to the registration by executing an instrument with the seven signatures which were required in order that it might be registered, assigning to the company a place of habitation in *Victoria Street, Westminster*, entering and registering for two or three years the names of nominative shareholders, with their paid-up shares upon it, and assuming, therefore, in all respects, the name and form of a company acting in this country. Whether or not a company can be registered in this country which conducts no business whatsoever, and never intends to conduct any business in this country, is a matter which has come into some discussion, and was discussed particularly in the case of the *Union Bank of Calcutta*, before the then Vice-Chancellor *Knight Bruce*, who declined to wind up the company on account of its being one in which it appeared to him that nothing whatever was intended at any time to be transacted in *England*. As regards this particular company, from the form of it there is no reason to say, in the first place, why business could not have been transacted in *England* if the parties had been so minded. They had ample powers under their deed so to do, and they had ample powers of meeting, if the directors thought fit, in *London*. Whether or not all this might not have been a device by which they were endeavouring in this country to induce people to enter into the concern, coming into this country where they might have thought money was abundant, where the shares might be readily taken up, and where they might thus obtain the double advantage of being a company with limited liability, and a company at the same time with shares which would pass from hand to hand without going through the process of being registered, is unnecessary to inquire into for the purpose of ascertaining whether or not the company is formed. I think what the Lord Justice *Giffard* says (1) in that respect is right, that it is not material to this case to consider the exact position of the certificated shareholders. But I do not quite go so far as he does when he makes this observation: he says they are either members of the company, or they are not. If

(1) L. R. 5 Ch. Ap. 377.

they are members then the company is properly formed, and if they are not, the only result would be that all the clauses with reference to that character of shares may become null and void. I do not think it is necessary for your Lordships to say anything of the kind. I think all it is necessary to say is this, that here there were numbers of people registering themselves in a form in which it is competent for persons to be registered, and the mere fact of the principal business being abroad will not prevent any foreign merchants coming to this country and availing themselves of the *Joint Stock Companies Acts*, and carrying on business as a joint stock company if they are so minded. All the prescribed forms were gone through, and it is impossible, I think, to say that the company was not registered and incorporated; but after being incorporated, when we find on the facts of this case that in reality no business has been transacted here from the time of its formation, except in the sense of an office being kept here, and some mere forms being gone through of certain books being kept, which were prescribed by the statute to be kept at the office; when we find that really and in truth no substantial business has been done in this country, when we find the deed in the condition in which we find it here, and that all the shares have been taken in the manner in which they here appear to have been *de facto* taken, namely, a large majority by persons whose names do not appear on the register at all, the Court of Chancery may well say that this is a case in which, as the Lord Justice observed, great injustice would be done to the creditors of the concern, and to those who might be allowed hereafter to become creditors, by permitting a corporation to remain registered, and to remain as a corporate body, which is in the condition in which we find this company to be. Therefore on every ground, not only on the ground of business not having been carried on (which is one of the things specified in the Act) for the term of a year, but not having been sensibly carried on, in fact, at any time in this country, but also from the position in which these shares are now found, every argument against the propriety of the deed, if it fail to satisfy your Lordships that the company is not incorporated, is an argument of course for extinguishing that thing which, although it has been in form incorporated, has not been incorporated in such a

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manner as to be effective for any possible useful purpose for which the Act of Parliament conceded the right of incorporation.

Then, my Lords, when you consider who it is that is raising this objection, of course the case becomes somewhat stronger; although if the position were granted that the company really could not be formed and never could come into existence, she would have a right to urge that as well as any one else. At the same time she is a person who has sought to avail herself of the Act of 1862 by becoming a member of the company, and seeking to have these privileges, and procuring for that purpose registration in this country. The persons seeking to have the company extinguished and wound up, are persons with whom this entity, which has thus been called into existence, has contracted debts, and they find, no doubt, great difficulty and embarrassment in pursuing the remedies which they may need to employ with regard to a company so singularly constituted.

This is therefore a case, my Lords, in which it appears to me that if we can once arrive at the conclusion, which I confess I have arrived at, that this company has been brought into existence (although far from holding out to any future speculators the possibility of such a company as this running any long course of existence), having come to the conclusion that this company has been brought into existence, I think all the arguments in the case tend to shew that that existence ought to be terminated as speedily as possible; and I am of opinion that the conclusion which has been come to by the Court below is correct, that the winding-up order ought to be made, and the appeal dismissed with costs.

LORD COLONSAY:—

My Lords, it is impossible to deny that this is a company of a very peculiar constitution. It consisted of seven members, as appears from the original memorandum and articles of association, and it contemplated, or professed to have in view, to carry on business in this country as well as abroad. That the scene of its operations was to be in other countries is no objection to the company being constituted here under the Act of Parliament. Many companies have been constituted here to carry on trade and operations almost entirely in other countries. We have instances

of railway companies constituted for constructing railways elsewhere, and for mining elsewhere, and for various other purposes—companies constituted by parties in this country, and intended to be carried on, probably mainly, by British capital, which have been regularly registered here, and have been subject to the jurisdiction and laws of this country. I cannot say that, on the face of this memorandum and articles of association, it does plainly appear that this company was not intended to carry on business here as well as elsewhere, and I can therefore say that there is nothing so wrong in the conduct of the party who had the charge of putting this company on the register, as to make it a subject of complaint here or elsewhere. When once in this country a company is registered and set in motion, and has acted under the registration, there is no mode, by the English law, of rescinding or recalling that act whereby the company was called into existence. There is no such process in this country, as there is in some other countries, of reducing or setting aside a thing which has been improperly or irregularly done in that respect, or which has turned out to be in some way inconsistent with the objects which were really contemplated, or were supposed to be contemplated, at the time of its constitution. Here is a company which is in existence, and now an application is made to have it wound up, an application at the instance of parties who are creditors of the company. Where the debts were contracted we do not know, and we do not now inquire, but there are creditors of the company who have made application for the payment of their debts, and have not been paid.

It is objected to the winding up of the company, not by the great number of shareholders, for they appear to concur in it, but by some parties who are partners in the company, that it is not competent to proceed with the winding-up, inasmuch as it appears that this company was not truly an English company, and was not a company entitled to the benefit of English law. But I cannot see that we can stop the proceeding on that allegation. It appears that the company was constituted by the number of persons required by the Act of Parliament. And it appears that it professed to carry on business in this country, and was registered here. A great many criticisms and objections have been made to the con-

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duct of the company; and I think it is difficult to look at its history, its mode of operation, and its whole career, without feeling a strong moral conviction that the objects in view in bringing this company into existence, and giving it the character and aspect of a British company, were somewhat of a sinister kind, though what they were we may not be able to discover. Whether it was done in order to obtain for it better credit elsewhere, or for any other purpose, I know not. These are mere conjectures and speculations, and I do not think we can give effect to them, certainly not for the purpose of stopping the progress and operation of those laws under which this company was registered and professed to be carrying on business.

In these circumstances I think we cannot do otherwise than affirm the judgment of the Lord Justice. It has no doubt been said that the party who is objecting to these proceedings is a person who has a very limited interest in this company. She has twenty shares, I think, all paid up, and it is said that she has no substantial interest in the result of these discussions. I cannot, however, say that she has not such an interest as entitles her to appear here, for she may have a belief that this company is in a condition to retrieve its position; she may have prospects of great future benefits from these few shares, or she may be of opinion that the winding up of the company, or the bringing it to a conclusion, might be more advantageously managed elsewhere. We cannot speculate on these matters. It does look at present as if the belief in obtaining those benefits was an exaggerated one in view of the amount of advantage that other persons think likely to result. It seems scarcely probable, at present, that the result will be anything more than the costs which may be the consequences of the proceedings here adopted, but some persons have a desire to carry out their views and intentions (as we see very often), without reference to pecuniary objects; and, therefore, I cannot say that this Appellant is not entitled to proceed as she has done. But I think that her contention is one which ought not to prevail. I think the company is a registered company, and that we must give effect to the winding-up clause. The irregularities in its proceedings, and the extraordinary character which it has developed in the course of the operations which have been performed, appear

to me to be no reasons at all against applying the law, but, on the contrary, to be reasons for giving effect to it.

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LORD CAIRNS:—

My Lords, I think that the question which is raised on this appeal is one of considerable consequence. I do not mean of considerable consequence as regards the present Appellant, for it is difficult to know or ascertain what is really the stake in the litigation so far as she is concerned; but of consequence with reference to the law of joint stock companies in this country, and with reference to questions which may be raised in other cases.

Now, in order to deal with the objection to the order of the Lord Justice which is raised by this appeal, it appears to me that we ought in the first instance to satisfy ourselves what was the precise position of this company immediately after it obtained the certificate of incorporation. Was it or was it not at that moment of time a valid corporation according to the law of this country? It had obtained a certificate of incorporation. So far, upon the surface, that was regular. A memorandum of incorporation had been registered according to the Act, and that memorandum had stated all that which by the Act is required to be stated. It gave the name of the company; it specified the part of the *United Kingdom* where the registered office of the company was to be found—it stated the objects for which the company was to be established—there was a declaration of the liability of the members, which was to be limited—the amount of capital was mentioned, and the division into shares of a certain fixed amount. That memorandum of association was presented at the proper office subscribed by seven persons, who, opposite their subscriptions, specified the number of shares which each was prepared to take. It is quite true that those seven persons were foreigners, but, in my opinion, that was no objection whatever to the incorporation, because if, in other respects, foreigners comply with the regulations of the Act of Parliament, it appears to me they ought to have the benefit of the Act of Parliament just in the same way that they could have benefited by the laws of this country by trading in this country. The memorandum of association contemplated trading in this

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country—not trading exclusively in this country, but trading in this country as well as in other countries. Therefore, taking the certificate of incorporation and the memorandum of association of the company, and taking the number of persons who applied for incorporation, and their subscriptions with regard to shares, it appears to me that all that the Act requires was complied with.

Now, was there anything with regard to the articles of association registered at the same time, which should deprive the other acts which were done of the consequences which would arise from this Act of Parliament? The articles of association were regular, as it seems to me, in all respects but one. They contemplated that there should be not only nominative shares, as they were termed—which, in other words, I should describe as shares such as were contemplated by the Act of Parliament; but that there should also be shares payable to bearer. I should say that the bearing of the articles of association, in my mind, is, that all shares should, in the first instance, be nominative, but that there should be a power to turn them afterwards into shares payable to bearer. And I agree that the legitimate construction of the articles is, that they intended that when turned into shares payable to bearer there should no longer be any registration or any shareholder upon the register. I have said that that to my mind was irregular; but I do not think it was an irregularity which vitiates the incorporation. It is not necessary to decide that, but it appears to me that the Registrar of Joint Stock Companies might well have refused to grant a certificate of incorporation upon the score of the irregularity which I have mentioned in the articles of association. And I doubt very much whether any mandamus would have been issued to compel him to register the company without an alteration being made in those articles of association. But although there was that irregularity, I find, notwithstanding, that there were seven persons clearly subscribing for and holding shares, and therefore persons whose names would clearly come upon the register, and, indeed, must be inserted upon it. And I find it was contemplated farther, that there would be, or might be, other persons holding shares of the regular kind, although I agree there was this farther stipulation, that there might be, and probably would be, persons holding shares payable to bearer. I therefore arrive at

the conclusion, that immediately after the certificate of incorporation was granted, although there was this irregularity in the articles of association, there was nothing which vitiated or made null and void the certificate of incorporation. I think the matter might be fairly tested in this way: Suppose the directors had proceeded to trade; suppose they had a number of shareholders subscribing capital, and taking these nominative shares; suppose they had traded in this country, and acquired large property in this country, and made large contracts in this country; and suppose an action had been brought against them in respect of one of those contracts; or suppose they had brought an action in this country in respect of their property, or in respect of their contracts; in an action of that kind, looking at the company either as Plaintiff or Defendant, would it have been possible to say in this country, in that state of things, that there was no such company, that the incorporation was utterly void, that the Plaintiff was a non-existing incorporation or person, or that, as a Defendant, there was no such Defendant who could be impleaded in this country? My Lords, I cannot arrive at that conclusion. I think the incorporation was valid.

But, then, looking at what happened afterwards, what we find is this: we find that, in point of fact, the company never has traded in this country; and I think it is a very legitimate suspicion to entertain, looking at the matter by the light of subsequent events, that it was never intended to trade in this country. We find that this provision in the articles to which I have referred (which I have termed an irregularity) has been largely acted upon, and that great numbers of the shares in the company (the far larger proportion) are held by persons whose names have never been brought on the register; that is to say, the holders have not been brought upon the register; they are holders of shares payable to bearer, which have been dealt with as such, and a great proportion of what ought to have been the capital of the company is, as I understand it, outstanding upon these particular shares. It is not for your Lordships now to consider what may be the position, as regards liability, of those persons who hold shares payable to bearer; but it is obvious that as they are not now upon the register, to say the least of it, there may be very great difficulty in making

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them answerable for the contributions which they ought to make towards the capital of the company.

My Lords, it might have been a very wise provision of the Legislature to say that in a case of that kind—a case where there was an abuse of the Act of Parliament going on, a case where, if it had been the matter of a royal grant, there would have been what is termed a forfeiture of the franchise, by reason of nonuser or misuser—it might have been a very wise thing for the Legislature to say that in a case of that kind there should be some summary, peremptory mode of reducing or getting rid of the incorporation, and putting an end to a state of things which was an abuse of, or a fraud upon, the Act of Parliament, and which ought not to be allowed to continue. However, the Legislature has not thought fit to provide any means in the nature of a process of reduction, in the ordinary sense of the term, for getting rid of an incorporation in any such circumstances. But, it appears to me, the Legislature has given powers under this very Act of Parliament quite large enough to deal with such a case, whether it was absolutely in the mind of those who framed these powers or not. I refer to the section which has been mentioned, which defines the circumstances under which a company ought to be wound up, or may be wound up. There are five cases in which a company may be wound up. The second runs thus: “Whenever the company does not commence its business within a year from its incorporation; or suspends its business for the space of a whole year.” Then the fifth is: “Whenever the Court is of opinion that it is just and equitable that the company should be wound up.” I do not stay to consider whether the second head literally and in terms meets the present case; that is to say, I do not stop to consider whether a company incorporated for trading in *England* and abroad, which does trade abroad, I will suppose, but does not trade in *England*, is a company which does not commence business within a year from its incorporation within the meaning of the second head. But the second head appears to me to throw a very strong light upon the principles on which the Court should act in dealing with the company under the fifth head, for it is by no means unfair to say that it was intended to cover, at all events, cases *ejusdem generis* with those which are found in the former

heads. Beyond all doubt it appears to me that this company has brought itself entirely within the spirit of the second head, and within the words of the fifth. Having regard to what is the spirit of the second, whether you can assert of this company absolutely that it has not traded at all within twelve months, I do not know; but I am quite sure it has not traded within the meaning of the Act of Parliament, for it has not traded in *England*; and, moreover, wherever it is trading it is a company which is now going on, and dealing with those shares to which I have referred, the shares payable to bearer, in a manner entirely repugnant to the spirit of the Act of Parliament. Therefore it seems to me it is exactly one of those cases where, even if we had not the case of a creditor coming forward and alleging non-payment of his debt, it would, under the other powers of the section, be just and equitable that the company should be wound up, because it is a company not trading in this country, and because it is a company dealing with its shares in a manner calculated to mislead the public, and defeat the just rights of creditors, and therefore that it should be put an end to.

My Lords, it appears to me that if the application here for winding up had not been the application of a creditor, or if it had been the application of a creditor merely resting upon the non-payment of his debt, or if it had been the application of a shareholder to whom no debt at all was due—if any one of those parties had come forward and said to the Court of Chancery, Here is a company which has received incorporation, but which is carrying on no trade in *England*; it is a company which is endeavouring to create shares without the persons who hold them coming upon the register, and being answerable for them, as they would be if they were upon the register; if either a shareholder or a creditor had come to the Court of Chancery and stated that case, and that case alone, it appears to me that it would have been fitting for the Court of Chancery to wind up this company.

My Lords, in this view of the case the arguments against the winding up of the company, which I own impressed my mind very much, they having been urged with great ability (and I must say that in many of the observations which were made in urging those arguments, I, to a great extent, concurred), become actually arguments for its winding up, and in my opinion those arguments,

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properly applied, entirely justify the order which was made by the Lord Justice, and I agree with your Lordships who have already expressed your opinion that that order should be affirmed, and this appeal dismissed, with costs.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 23rd May, 1871.

Solicitors for the Princess of Reuss : *Freshfields.*

Solicitor for Bos and Duboucq : *J. R. Bailey.*

Solicitors for the *International Land Credit Company* : *Townshend, Lee, & Housman.*

Solicitors for the *General Company for the Promotion of Land Credit* : *Baxter, Rose, & Norton.*

JOHN CANNINGTON AND EDWARD CANNINGTON } APPELLANTS;

AND

FRANCIS DIXON NUTTALL RESPONDENT.

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May 5, 8, 9,
11, 12;
June 12.

Patent—Specification—Disclaimer—New Combination of old and well-known Things.

A patent may be sustained though each principle or process in it was previously well known to all persons engaged in the trade to which the patent relates, provided that the mode of combining these processes was new, and produced a beneficial result, and provided, also, that the specification claimed not the old processes, or any one of them, but only the new combination.

A patent was taken out for an improvement in the mode of manufacturing glass. The old mode had been that of putting the materials which were to form the glass in pots placed on “sieges,” or benches, with the fire underneath, the rising flames of which played around them, and when they became too hot and cracked, they were removed from their position, and the overheated and cracked parts were presented to a current of cooling air, and the molten material was thus, partially at least, saved from waste, and the cracks in the pots were stopped up with a portion of it, and were thus preserved from destruction. The new method consisted in adopting some previous improvements (such as suppressing the fire pots, placing the materials in a tank, &c.), to which the patentee laid no claim, and in combining these things with an improved furnace. His invention consisted of “forming the sides of the tank or chamber containing the glassmaking materials hollow, in such wise that a current of refrigerating air may circulate and prevent any excessive heating of the sides which retain or inclose the fused materials.” Though all the principles upon which the new method was based were well known, the new form of combining them was shewn to make the melting of the materials less subject to danger and less costly in use:—

Held, that this new form of combination, being useful and valuable, constituted a valid ground for a patent:

Held, also, that a direction to a jury that, if the combination was new and was useful, the patent could be supported, though each separate process employed in it was previously known, was correct.

Per LORD WESTBURY:—If there is a patent for a combination of machinery originally directed to one purpose, and a person afterwards adopts that combination in order to make it minister to another and additional purpose, his doing so constitutes an infringement of the patent.

IN May, 1866, *Antoine Pocheron*, a native of *France*, took out an English patent for “Improvements in the Manufacture of Glass.” On the 4th of April, 1867, he amended his original specification by a disclaimer and a memorandum of alteration. The Appellants

7 Cl. 575
10 Cl. 60
2 App. Cas.
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and Respondent, then being in partnership, had become assignees of the patent. They afterwards dissolved partnership, and the interest in the patent remained in the Appellants only. The Respondent obtained a patent for similar purposes, his specification was dated on the 12th of December, 1867, and he erected furnaces, &c., in accordance, as he stated, with the specification in his own patent. The Appellants, conceiving that he had infringed their patent, took proceedings against him in Chancery, and the Master of the Rolls directed that a trial of issues in fact relating to the novelty and value of *Pocheron's* patent, and its alleged infringement by *Nuttall*, should take place before himself and a jury.

The old and ordinary form of a glass furnace was this: a conical building (resembling a chimney) was erected; and inside was another conical building (or chimney) of nearly the same shape, but of smaller size, under which was the fire for melting the substances of which the glass was to be composed. At the very bottom of the building was an underground tunnel, technically called "a cave." There were five bars placed at the top of the "cave," in the centre of the floor of the furnace. On each side of the fire were banks, called "sieges," so that the flames played around and over the pots. The pots for holding the materials were large vessels, weighing often 25 cwt. each. When about to be used they were annealed in a separate furnace. They were built into the melting furnace, and filled through the working holes. When in use and filled with material in the course of fusion, the pots are liable to be cracked by the intense heat, in which case the pot must be turned, in order that the cracked side of the pot may be exposed to the open air, by which the molten glass oozing through it congeals and stops the crack. This is a troublesome and expensive proceeding, and if not well and effectually done, the glass in the cracked pot runs away, is lost in the furnace, and other mischiefs ensue. Mr. *Pocheron* conceived the idea of remedying these evils, and the plans he adopted will be most correctly understood from his specifications and disclaimer.

The provisional specification stated that "my invention consists in the suppression of the fire-clay pots or crucibles in general use, and placing the materials to be melted in the oven or kiln itself. In order to effect my purpose I modify the usual inner form of the lower part of the kiln by doing away with the banks, on which

the pots are now placed, and levelling the bottom. I also construct the lateral sides with double walls uniting at the top, so that there is in each side a chamber through which a current of refrigerating air may be made to circulate, and prevent the too great heating of these sides which are to retain the matters in fusion."

The full specification, filed on the 31st of October, 1866, stated that "my improvements relate to the melting or fusing furnaces or kilns, and *consist in* the suppression of the fire-clay pots or crucibles hitherto in use, and *in* placing the materials to be fused or melted within the furnace itself, the usual inner form of the lower part of which is modified by doing away with the sieges or banks, and the general *levelling of the bottom*. The lateral sides are constructed of a hollow form, in such wise that a current of refrigerating or cooling air may be made to circulate around, and prevent any excessive heating of the sides which are to retain or enclose the materials in fusion." The specification then referred to accompanying drawings to shew how the patented process was to be employed, went into details as to the labour, cost, and wastefulness of the existing system, and concluded thus: "By the method herein described no pots or crucibles are used, consequently all expense in this respect is done away with: there is a considerable saving of fire-bricks in the construction of my new furnaces: no more deceptions in the calculations of the glass-maker: quicker fusions: more lengthened working, and no more disasters: in fact, all the defects of the old furnaces are removed, and a saving of from 50 to 60 per cent. in fuel is effected."

The disclaimer, filed on the 17th of May, 1867, said, "Whereas I have been advised that the specification may be held to claim generally the suppression of the fire-clay pots or crucibles hitherto in use in glass-making, and the placing the materials to be fused or melted within the furnace itself, and as I do not wish to retain or make any such extended claim to invention, but desire to limit my claim to the forming the sides of the tank or chamber, containing the glass-making materials, hollow, in such wise that a current of refrigerating air may circulate, and prevent any excessive heating of the sides which retain or enclose the fused materials, I, for this reason, wish to disclaim, and do hereby disclaim, all parts of the said specification which claim the suppression of the fire-clay pots, and placing the materials to be fused in the furnace

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itself." It then stated the verbal alterations intended to be made, and set forth the specification as amended by the disclaimer. Instead of the words "*consist in*" he introduced the words "have reference *to*," instead of the words "*in* placing," he used the words "*to* placing," and after the words "*levelling of the bottom*," he introduced the words "to which separately I make no claim but according to my invention," so that the last passage read thus, "to which separately I make no claim, but according to my invention the lateral sides are constructed" &c.

The Respondent filed a specification in which his invention was described as follows: "The tank is made of fire-clay bricks or blocks, or of fire-clay or pots in any ordinary way, and is supported on pillars or walls with space between; these pillars or walls and spaces constitute the 'cave.' The fire-grate, or fuel chamber, is formed at the side of the tank, preferably at some distance therefrom, in such a manner that only a limited supply of oxygen is admitted to or amongst the fuel. The gaseous product of the partial or slow combustion of the fuel induced in this way passes along a flue, and when just over the tank, or before it reaches it, heated air is admitted, intense combustion is thereby induced. The volume of heated air admitted determines the temperature in the tank and flues; the heated air is taken from the cave, where it is raised in temperature by radiation, or from pipes which are passed through or over the fire-grate or fuel chamber."

The Respondent afterwards gave this description of his own furnace: "It is a reverberatory furnace, with a tank, two fires, one at each end, and a cave or ashpit below the tank. It has not an air chamber round the tank for the circulation of a current of refrigerating or cooling air, nor any similar appliance. On the contrary, my object being to get and retain as much heat as possible, the sides of my tank are solid all the way round, with the exception that between each fireplace and the tank, but nearer the fireplace than the tank, there is a narrow aperture or flue for the purpose of conveying air from the cave or ashpit, through the bridge into the furnace. At the entrance from the cave the aperture or flue has an area of sixteen square inches only, and it widens in the body just enough to provide for the expansion of the air from the heat of the furnace. This mode of introducing air by means of what is usually termed 'a split bridge,' has long been

well known and commonly practised as a valuable method of increasing combustion. It was the subject of a patent granted, so far back as 1820, to Mr. *Josiah Parkes*, who is generally recognised as the originator of the split bridge."

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At the trial of the cause before the Master of the Rolls, the Respondent denied the novelty of *Pocheron's* invention, and insisted that it had been anticipated in *Siemen's* patent, 1857, in *Beatson's* patent, 1864, and by *Boetius's* specification in 1866. Evidence on both sides was adduced. The Master of the Rolls, in directing the jury, said, that in his opinion, notwithstanding the disclaimer of the use of certain expressions in the specification, *Pocheron* asserted his claim to the combination of each and every part described in the original specification, that the patent was for the combination of several separate and distinct matters, of which the air chamber was only one, and that the validity of the patent was not affected by the circumstance that each of the separate matters which went to make up that combination might have been anticipated. If the mode of combination was new, and a new and beneficial result was produced, that was sufficient to sustain the patent. The jury found a verdict for the Plaintiffs, and on application for a new trial the Master of the Rolls, on the 16th of December, 1869, refused it. An appeal was then brought, and Lord Justice *Giffard*, being of opinion that there had been a misdirection of the jury, made an Order on the 28th of January, 1870, by which he reversed the decision of the Master of the Rolls, and ordered a new trial. This appeal was then brought.

Mr. *Grove*, Q.C., and Mr. *Fooks*, Q.C. (Mr. *T. Aston* and Mr. *Carpmael* were with them), for the Appellants, contended that the case had been properly left to the jury on the evidence; that in order to impeach a verdict on the ground of misdirection there must be some error in the direction on a matter which was material to the verdict itself: *Crease v. Barrett* (1); that there was nothing of that sort here; that the specification as amended did not, as the Lord Justice supposed, preserve the claim to each and every part of the combination, but distinctly confined the claim to the combination itself. That combination itself was new, and was beneficial, and the verdict pronounced upon the direction was perfectly good.

(1) 1 Cr. M. & R. 919; 5 Tyr. 458.

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Sir *R. Palmer*, Q.C., and Mr. *E. Macnaghten* (Mr. *Herschell* was with them), for the Respondent, insisted that the construction put by the Lord Justice upon the direction of the Master of the Rolls, and on the specification and disclaimer, was right—that in truth the disclaimer had preserved the claim in respect of all the various matters of which the alleged combination was formed. In specifications words must be correctly employed, and the description given must be precise, so that the claim must not appear to be more extensive than it really is: *Betts v. Menzies* (1); *Seed v. Higgins* (2). The parts which here were alleged to constitute the combination were all well known, and were applied to purposes similar to those to which they were applied in this patent. Now, where there are two similar things used for a similar object, and capable of the same application, one of them having been long known to mechanics, the introduction of the other into a like use will not constitute a good ground for a patent: *Harwood v. The Great Northern Railway Company* (3). So in *Jordan v. Moore* (4) the vague and indefinite use of the words “iron frame,” which made the claim apparently extend to frames of iron and wood, already well known, prevented the patent from being sustained. And in *Penn v. Bibby* (5) it was held that the application of known means and contrivances would not sustain a patent unless such application was quite new, and was not such as any previous application of them would have suggested. That could not be said to be the case here. A combination of several things, some old and some new, will not support a patent unless that which is claimed in the specification as a whole is new: *Newton v. The Grand Junction Railway Company* (6). There is nothing here to support the patent on the ground of novelty.

Mr. *Grove*, in reply.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, in this case the Appellants filed their bill in the Court of Chancery for the purpose of obtaining an injunction against the

(1) 8 El. & Bl. 923; 10 H. L. C. 117. *See MS 1164: 9 Jan 72 529*

(2) 8 H. L. C. 550. *See MS 1164: 16 Jan 72 514*

(3) 11 Ibid. 654.

(4) Law Rep. 1 C. P. 624: *12 Jan 72 5766*

(5) Ibid. 2 Ch. Ap. 127.

(6) 5 Ex. 331; see *Bovill v. Keyworth*, 7 El. & Bl. 725.

infringement of a patent of which they were the proprietors, the patent being for an invention by a foreigner of the name of *Pocheron*, with reference to the melting of glass. They filed the bill against Mr. *Nuttall*, for the infringement of this patent by the user of a certain description of furnace, which they say, in substance, contains the invention of Mr. *Pocheron*, described in his patent. The usual issues were directed, namely, whether or not Mr. *Pocheron* was the true inventor? whether or not the invention was new? whether it was useful? whether the specification was sufficient? and whether the patent had been infringed? These issues came on to be tried by a jury before the Master of the Rolls, and the jury found for the Appellants, the Plaintiffs in the suit, upon all these issues. A motion for a new trial was made before Lord Justice *Giffard*, on several grounds as I understand it, and the Lord Justice upon one ground, and an important ground, decided that the case must be sent to a new trial, namely, upon the ground of a misdirection by the Master of the Rolls to the jury in his summing up. The question, as it now comes before your Lordships, is this, whether or not the order of Lord Justice *Giffard*, directing a new trial, should be affirmed or reversed. At the same time, my Lords, the argument before us has not been confined to the question of whether or not the Lord Justice was right in deciding that the Master of the Rolls had misdirected the jury; but the case also has been argued very fully before your Lordships upon all the points upon the several issues which have been raised, namely, upon the point of novelty, the point of utility, and the point of infringement.

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Now the patent was taken out under these circumstances:—The melting of glass had, for some time before these letters patent were taken out in the year 1866, been carried on in furnaces constructed in this fashion. The pots containing the materials for making the glass were placed within the furnace. There is a little ambiguity as to the way in which the word “furnace” has been used. Sometimes it is designated a kiln, and perhaps I had better call it kiln. The thing consisted of an apparatus of this description: Upon each side of the fire were placed what were called *sieges* (seats) or benches, upon which benches were placed large earthenware pots, constructed as they best might be for the purpose of resisting great heat, namely, the heat which would be applied to them

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externally, from the immediate action of the fire, and the heat which would be applied to them internally by the continued increase of the temperature of the metal, as it is called—the flint which they have to melt in the process of making the glass. The difficulty that arose from this mode of melting the materials for the glass was this, that great expense was continually incurred, and great delay also, by reason of the pots becoming overheated, in consequence of which they were, after a very short space of time, rendered useless from fissures, or otherwise, and they were very quickly worn out. There were both trouble and delay in another respect, namely, that in order to avoid these consequences, and to preserve the pots as much as possible, it was necessary from time to time to turn round that side which was most exposed to the fire, in order that that side might have time in a small degree to cool, and that the other side might be exposed in the meantime to the action of the fire, that other side not having been previously exposed to so great a degree of heat. And it was of great importance to take care that the pots should not be broken, not only on account of the value of the pots (though that was not inconsiderable), but because in consequence of the breaking of the pots the metal would be poured out into the furnace and lost; and in that respect a greater expense than the value of the pots would be incurred, and also considerable delay in readjusting the furnace, and placing fresh pots for carrying on the work. These pots were of very great size and very cumbrous, the weight of metal in them was considerable.

Now, as is always the case, before a really useful invention is promulgated, the minds of persons engaged in this manufacture had for some time been directed to the removal of this difficulty, and suggestions arose early—suggestions in some instances were made, I think, of something of the kind used in a patent by one *Beatson*—for the purpose of getting rid of this difficulty. It was suggested that the pots might be improved, and that the metal might be melted in something of the shape of a tank or cistern. A suggestion was also made as to a better arrangement of the fire, and likewise for the removal of the sieges, or benches, everybody agreeing that, if it were possible to manufacture the glass differently, a great advantage would be gained in getting rid of the pots.

Now the person from whose invention the Appellants have derived

their patent, Mr. *Pocheron*, thought of an invention by which this scheme could be carried into effect. He thought that it would be possible to remove the sieges and the pots, and to substitute, for the purpose of heating the metal, a tank by means of a contrivance which should obviate difficulties existing in the way of having a tank formed. Of course when you have a tank, one question would be where to apply the fire—whether you should apply the fire at the bottom of the tank or not; and then came the consideration that if the fire was applied continually to the bottom, it would be necessary to have, probably, a greater degree of heat *ab extra* than would have been required by the pots under the former system, and that the molten metal, being continually subject to the increased temperature by the action of the furnace upon it, would become so intensely hot that the tank would soon be worn out and the metal would pour itself into the furnace. That was not a mode, therefore, in which the fire could be applied. It would consequently be necessary to apply the fire to the sides of the tank. The same person had already thought of that operation; but then those sides would become subject to the same action as the pots were subjected to, the intense heat to the sides *ab extra*, and the intense heat *ab intra*, arising from the effect of the accumulated heat continually transmitted to the metal from the external furnace. Therefore Mr. *Pocheron's* idea was this:—[His Lordship here stated very fully the object which Mr. *Pocheron* had in view, the means he took to effect it, and the description of those means as given by him in the specification and disclaimer.]

Now the question that arises is, whether or not the Appellants' patent is a valid patent, regard being had to the peculiar circumstances which attended the first taking out of the patent and the subsequent disclaimer, and the result of the patent as affected by the disclaimer which the inventor made, and what he ultimately, by his amended specification, claimed as his invention. And here it is very important to analyse, in the first instance, the distinct character of his claim, which we shall best do by seeing what it was as it stood in the first specification, and what it afterwards became. In his first specification, he states his invention thus:—[His Lordship here read the words of the original specification, see *ante*, p. 207.]

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It seems to have struck this gentleman afterwards (being informed probably that other attempts had been made in the same direction, as so commonly happens when an important invention is made) that it might be contended that a portion of that which might be thought by others to be claimed as part of his invention was not new in itself, namely, the suppression of the pots and the removal of the sieges, and the use of a tank; therefore he thought it wise to file a disclaimer:—[His Lordship read it.]

There has been much question upon this, and, I am sorry to say, much expense, and time, and vexatious litigation, occasioned by a controversy of a very singular character, which really I have not been able, with all my most unfeigned respect for the experience of Lord Justice *Giffard*, adequately to appreciate. The distinction which appears to have been taken by the Lord Justice, as contrasted with the view taken by the Master of the Rolls, is this—the Master of the Rolls says plainly and distinctly, that every portion of this matter which has been so disclaimed, and every portion of the process which Mr. *Pocheron* had spoken of in his specification, which would include of course the process of the air circulating round, every portion of the process taken by itself had been anticipated; but that it was for the jury to consider whether or not the combination which he had produced was a novel combination and was a useful combination. The Lord Justice says that the Master of the Rolls ought to have put the case thus to the jury: not whether this is a combination of known arrangements, known in a certain degree, known in particular portions in detail, and now put together into one combination which effects that which has not been before effected, and therefore effects a useful purpose, but that he should have pointed out to the jury clearly that there was but one portion of the patent which could be sustained, for that having disclaimed separately the removal of the sieges, and the removal of the pots, and the use of the tank, he had thrown all that open to the public; so that everything might be used except that one thing which he had added, namely, the process for circulating air round the tank. And the Lord Justice adds, that that invention or process is the only process which had claims to novelty and which is covered by the patent. Then he says, inasmuch as for other descriptions of fur-

naces, for puddling iron and the like, the process of circulating air *ab extra* with a view to cooling the furnace has been adopted, it at least ought to have been put to the jury that the mere circumstance of adapting that which has been used for a given purpose on one subject matter to an identical purpose upon another subject matter, is not a subject for letters patent. The Lord Justice referred to other cases of a like description, namely, certain things done in iron by a certain process, by the application of which process the same things were afterwards done in wood. In such a case you cannot say that it is a new invention, when the same process is used for effecting the same object with a different material. Therefore, the Lord Justice says that the Master of the Rolls should not have told them that this was a new combination, but he should have told them that it was an addition to a well known thing then in use, and that the addition only was entitled to protection.

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I apprehend that that is not the case with reference to these letters patent. What *Pocheron* claims is this, he says that the glass manufacturers have been very desirous to get rid of these sieges and to get rid of the pots, and they thought of various plans for so doing. It had been suggested that the sieges should be removed. It was suggested in one case, I think, that a tank should be used and placed upon the earth, and fire applied to the sides. But although all these things had been done, yet the glassmakers had not yet got what they wanted; they had not got an effectual mode of getting rid of the pots, and getting rid of the sieges, and making glass without them. Now, said the patentee, I think I have got it; but in the first place I said that my invention consisted in doing that. But that was a wrong expression; because others know that that can be done, and they have tried it; so I had better not speak of my invention as being the removal of the sieges, or the removal of the pots, but my mode of effecting the object is by so placing the tanks as to obviate the bursting of the pots through the extreme heat. I will make that very objection, if it takes place, work its own cure. I will so carry the air around the sides of the tank that when the melted material does burst forth from it, and permeate a portion of the sides of the tank in consequence of the extreme amount of heat to which the tank is subjected, I

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will take care that an external cooling apparatus shall be at hand which shall arrest and congeal the fluid, and enable the congealed fluid to operate to the end that we have in view.

It is quite apparent, my Lords, that the cooling thing, the current of air, was nothing new—it is as old as the fables of *Æsop*—it is as old as the man blowing his soup in order to make it cool. But so it is with every new invention—the skill and ingenuity of the inventor are shewn in the application of well-known principles. Few things come to be known now in the shape of new principles, but the object of an invention generally is the applying of well-known principles to the achievement of a practical result not yet achieved. And I take it that the test of novelty is this: Is the product which is the result of the apparatus for which an inventor claims letters patent, effectively obtained by means of your new apparatus, whereas it had never before been effectively obtained by any of the separate portions of the apparatus which you have now combined into one valuable whole for the purpose of effecting the object you have in view.

Looking at the evidence in this case, which your Lordships have before you, I think it is as plain as possible that this desirable end of avoiding the pots, and removing the sieges and getting rid of the difficulties arising therefrom, had not been effectively obtained until this gentleman hit upon this ingenious mode of achieving the object by this invention. It appears to me that there is a fallacy in saying that because you disclaim the invention of these particular things, and you thereby (as the Lord Justice expresses it) throw them all open to the public, that therefore when you, by means of an ingenious invention, bring all these known ideas into one valuable and useful combination by a certain application of a cooling process, you are only to be credited with the cooling process. The cooling process may be applied to anything else—it has been applied to iron and to everything else in the world. Here the cooling process was applied to this combination for a particular purpose and by particular means. And unless the evidence shews that the combination was not new, I apprehend that the Appellant has made out his case.

My Lords, having thus stated my views upon the question raised in this case, I am not about to enter into any enlarged or

elaborate analysis of the evidence, but I shall have a word to say upon the question of infringement, and what the character of that infringement is. I think it is plain from the result, as testified to by Mr. *Hartley*, and by Mr. *Pocheron*, the inventor, that the invention itself was useful, and that it had not heretofore been applied, whatever may be said as to whether or not the various separate component parts of the invention had been known.

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With respect to the value of the invention, I think the testimony of the Respondent himself should not be overlooked. The Respondent was in partnership with the Appellants, the owners of Mr. *Pocheron's* patent, and having so been in partnership with them, and having afterwards separated from them, the Respondent himself was minded to take out a patent for an improvement upon Mr. *Pocheron's* patent. And what does he then do? I am not in the slightest degree using the fact of the partnership as being in any way adverse to the Respondent's position, but I am only using an application on the part of the Respondent to the Appellants as a proof of the value of the invention, in the Respondent's own mind, before the litigation. It appears that, after separating from the Appellants, he desired to work with their patent. And a letter was written, dated the 23rd of August, 1867, in which the Respondent says, "I beg to make you the following proposal for a new furnace to be erected in No. 3 house; and if you accept it all disputes will, for the present, be put away. The furnace to be built with *Pocheron's* patent flue round the sides of the tank. The bottom of the tank to be built according to a plan of mine. Fifty pounds per annum to be paid to you as royalty for the whole duration of the furnace." Now, my Lords, I apprehend that that offer would scarcely have been made if this gentleman had been of opinion that in reality there was nothing whatever in *Pocheron's* patent, or if he had considered that *Pocheron's* patent was in itself useless. It seems to me that we have here evidence that he considered that *Pocheron's* invention was a very ingenious one. As to the invention itself, I am not saying that it was a new way of cooling hot substances, because that would be absurd; but the invention was substantially this: He said, I see now a way of obviating the difficulty which has hitherto prevented success in any attempts at melting in the tanks. The whole difficulty had been in stopping

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any flaw in the tank, which might have occurred just as much as it did in the pots. He says, in effect, I have obviated that difficulty by means of these currents of air by which the sides are refrigerated. I have hit upon a mode of preventing the glass from bursting out and being lost and destroying the furnace.

Now, my Lords, I have only only to touch upon the question of infringement, and upon this I have very little indeed to say. The question is: Whether the Respondent has infringed the patent by his mode of proceeding. What the Respondent has done is this: He has not carried the hollow all round the tank, but he has so constructed his apparatus within the kiln that the furnaces proper, that is to say, the fires, are placed at the sides, as is the case in *Pocheron's* patent; and those being (as Mr. *Bramwell* has described it in his very clear evidence) the two vulnerable points of the furnace or of the tank—because, of course, the heat is greatest where the direct action of the fire is introduced upon either side—he does not take it all round, but he carries up, by means of what is called technically a split bridge, a space between the fire and the tank. There is that space open at the top, which is the reason why it is called a split bridge; but that space can be, according to the evidence, closed if desired, and it is occasionally closed. He runs up that space upon either side between the furnace and the tank instead of carrying it all the way round. There is, of course, a certain amount of external air approaching the bottom of the tank, not quite so much as it is according to the Appellants' invention; and it is said that he has also outer walls and apparatus at the sides of his tank, but I pay no attention to these circumstances. Certainly there is not the same circular belt of air which there appears to be in *Pocheron's* invention; but at the vulnerable points, at which it was most important that the furnace should be preserved, the air is supplied and is running up, and it is performing the very purpose for which in *Pocheron's* patent air is introduced. It is cooling the sides of the tank, and it is cooling them just where they most want cooling, and is thereby either preventing the glass from exuding in any way at all, or if it does exude, it operates for the purpose of congealing it in the same way as *Pocheron's* patent does. Now, my Lords, I apprehend that in that point of view it is a plain infringement of *Pocheron's* patent; because that which is

admitted on all sides to be the main point of the invention, namely, the introducing of air all round the tank in order to cool the substance in the tank, and to produce congelation in the case of the fluid exuding, is the exact effect which is intended to be produced.

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But how does the Respondent meet this? He says, Our two processes are different as possible. Now, I have read through the evidence very carefully, and have read the arguments of the learned counsel, from which I can gather the manner in which the matter was put to the jury by them. It does not appear to have struck the counsel on either side, at least not Mr. *Webster* (for Mr. *Grove* would not have taken that view) that the Respondent's only claim was for the sort of addition which he made to the process, and not for the combination, because Mr. *Webster* puts it thus—he says: The question is, whether it is a question of a combination for refrigeration, or an apparatus for adding extra heat by intensifying the combustion. Our apparatus is intended to intensify combustion, it is exactly the opposite combination. What was the combination? Of course, when it reached the chimney, where the products of combustion were combined, there would be a draught of warm air, and, of course, that current of warm air by itself would intensify combustion—But how had the air been warmed? The air had been warmed by cooling the tank. Warming and cooling are a reaction in physics. You cannot warm one thing by another without cooling that other, and *vice versâ*; the air will be warmed, and then you will get a hot blast, the hot air will be going up the chimney at the same time. That may be an improvement (some think it is not) upon the Appellants' invention, and therefore it might have been very proper that Mr. *Nuttall* should have his patent for his additional process, paying £50 a-year, or whatever else he promised to pay, or whatever else Mr. *Pocheron* might be pleased to receive, for the partial user of his invention, Mr. *Nuttall* thus getting the benefit of his own improvement. But undoubtedly the operation would be the cooling of the tank in what Mr. *Bramwell* calls the more vulnerable points. It is possible that the Plaintiff, by carrying the air all round, may not have made quite so useful a thing as this process does. Some of the witnesses say that by carrying the air all round you produce an equal amount of refrigeration upon all points, whereas if you only refrigerate the

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more vulnerable parts you are doing all that is wanted, because the other parts, not being so vulnerable, do not require that refrigeration, and it may happen that you may refrigerate them too much, and if you do so you do mischief. I do not think that there is any evidence to shew that any mischief has been done, or that the patent has been rendered useless by that operation. In answer to a question from my noble and learned friend on my left, there was a statement made incautiously, as it seemed to me (although Mr. *Grove* is a very cautious counsel usually), as to whether or not the running all round of the air was important, because undoubtedly in the Respondent's case the air does not run all round the tank, unless you are to bring in the somewhat strained argument that the external air upon the sides of the tank would be to some extent cooling to the tank itself. I apprehend the point is this, that if you find the air applied at the most vulnerable point, where it is most wanted for the purpose of cooling, the mere circumstance that it is not done in exactly the same way, or that it is not carried all round, does not touch the question of the infringement of the essence of the invention. If the same object is attained by the same process which is here introduced, and introduced for the purpose of attaining it, then I apprehend that the infringement has taken place.

Now, if that be so, the only remaining question, which was here argued at very great length, is the question of novelty as affected by previous patents: *Beatson's* patent, *Boetius's* patent, *Siemen's* patent, *Parke's* patent, and various other patents which were brought forward in order to destroy the claim of novelty. We are told of *Beatson's* patent, a very obscure instrument, and not well understood, I think I may say even by Mr. *Bramwell*, who was called as a witness, and who, I apprehend, gave truthful testimony in every way; nor was it understood or explained upon the other side so as to make it clear that that was an anticipation of the Appellant's patent; indeed the evidence leaves the impression that it was a patent which was never carried into full effect. Other persons made various other attempts in similar ways, but with no result at all similar to the present patent, unless a question might be raised with regard to *Richardson's* patent, which seems to approach the nearest to this. But there were several circumstances which occurred with regard to *Richardson's* case which it is important to

observe. It did not last for more than three or four months; I think it was stated that the excise laws pressed rather severely upon it; but during a portion of the time that it was used it so happened that the excise laws had come to an end—but still it did not succeed. But, farther than that, we have to rely upon drawings made after the thing had ceased to exist. Upon that I should venture to make this remark: If the Master of the Rolls was not wrong in his summing-up to the jury, then we have here a case in which the jurors sat for three days, and very patiently heard the whole of the evidence, and had the whole of these patents placed in their hands (some of them being patents simply for improvements, as I understand, in iron furnaces, and others being patents having reference to the process of cooling), and, amongst other things, they had *Richardson's* evidence and his drawings placed before them. I say, therefore, that if there was no misdirection of the learned Judge, that we should be taking upon ourselves a function which we ought to be very slow to exercise, namely, to determine against the verdict of the jury, given under proper instruction by the Judge upon the points of law, and after a careful and patient consideration of the case. The jurors appear to have been both intelligent and careful, and, indeed, it was said that one of them was specially acquainted with the subject. But, however that may be, this jury, after patient inquiry and consideration of the case, came to the conclusion which has been appealed from.

Now, with regard to the alleged misdirection of the Master of the Rolls, I do not propose to go through his direction to the jury, nor the observations of the Lord Justice upon it, because I have in effect done so already in my remarks on the whole case. The question turns upon this: the Lord Justice quotes passages from the Master of the Rolls' direction to the jury, in which he seems to lay stress upon the removal of the pots and of the sieges, as if that had been the pith and marrow of the invention; whereas the inventor expressly disclaims that as being any part of the invention. I have read carefully that passage of the Master of the Rolls' summing-up, which is most fully set out in the Lord Justice's judgment, and it simply comes to this: the Master of the Rolls does much what I have been asking your Lordships to do, in pointing out the thing aimed at by the specification. The thing

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aimed at was this: the removal of the pots and the making of a clear space round the tanks in which the metal was melted. Those were part of the subject matter, and were matters of great importance. But the Master of the Rolls is careful to tell the jury in so many words that these separate portions were not claimed as inventions, but that the patent was claimed only for the combination which was achieved by means of Mr. *Pocheron's* invention. The Lord Justice quotes these very passages, and it appears to me that they must have prevented any possible misconception, on the part of the jury, of anything that had been previously said as to the usefulness and importance of the separate parts of the invention.

Now what, as the Master of the Rolls finally says, is in truth the point to which the invention comes? he puts it thus: "if a person takes well-known processes from a great number of sources and a great many inventions, and adapts them altogether to a perfectly new combination, for a perfectly new purpose, their previous use is not, in my opinion, an anticipation of the patent. And therefore, considering under *Pocheron's* system, his patent is a combination of all these various matters, such as the air chamber and the like, I do not think that you ought to consider the fact of any of those, or all of them separately, having been anticipated, prevents the novelty of *Pocheron's* patent, he having combined them all together for a perfectly new and distinct purpose." And then he tells the jury (and that is rather important) still more strongly in another passage what in fact that purpose had been: "There seem to be from the evidence of all the witnesses who have been called upon the subject two matters of the greatest importance in the making of glass. One is the production of the greatest quantity of heat that you can get inside the part where the materials are placed for the purpose of fusion; and at the same time the second is to put them in such a position that the extreme subtlety of the fluid when in a state of fusion will not escape from the vessel in which it is placed. *Pocheron's* invention seems to have been intended for that purpose" (namely for the production of the greatest quantity of heat that you can get) "and accordingly his invention" (now this is what he tells the jury is *Pocheron's* invention) "his invention I think, has been correctly described by Mr. *Bramwell*, when he says it was placed in a species of basin of air, and that he intended to have

some non-conducting substance all round it. Mr. *Bramwell* has pointed out, what must be obvious to every person who has considered the matter, that the most vulnerable part of such a tank or vessel would be that interval which lies between the hot fused mass in the tank and the furnace which created the heat, and that the great object was to make some interval there by which the heat could not be communicated through to the tank, and by that means allow the glass, when in a state of fusion, to escape in that way. That appears to have been the principal object of *Pocheron's* invention. He carried the air channel or air chamber all round the back of it," and so on, and then he describes it, and he says, "Every one of those (things) separately is anticipated in these patents, but that does not, in my mind, prevent the validity of a patent for their combination."

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Then it seems to me that the Master of the Rolls has here done two things. He has told the jury what the subject of the patent is, namely, that it is confined to that combination and the passing of the air around the tank, that being the principal point in the combination, and the other arrangements being made in connection with it. And he tells them that all the other points were old and anticipated, but that *Pocheron* joined the whole of them together and produced a new result.

My Lords, I have read the whole of the evidence which has been produced, and I might occupy your Lordships' time for the rest of the day in going through the detail of it. But what I venture to suggest to your Lordships is, that we ought to put confidence in the jury, unless we find that there was a misdirection on the part of the learned Judge, or that there is important evidence tending to the direct contrary of the decision which the jury had arrived at. I am at a loss to find any such evidence, and therefore it appears to me that the order of Lord Justice *Giffard*, directing a new trial, ought to be reversed, and that the order of the Master of the Rolls ought to be affirmed.

LORD WESTBURY:—

My Lords, I might well abstain from adding anything to that which your Lordships have heard from my noble and learned friend; but perhaps it would be more satisfactory to the parties,

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and certainly more respectful to the learned counsel who have argued this matter, that I should give my view of the case. My Lords, in cases of this kind it has struck me, from some experience, that it is very much to be deplored that the nature and effect and the true construction of the specification of a patent are not first judicially ascertained, before there are farther proceedings by the examination of witnesses and a trial at law. It has occurred to me in several cases to find that thousands of pounds and many months of litigation were consumed, whereas the real point lay in the judicial construction of the specification, which, unfortunately, has often been the last thing that was considered.

The matter here turns almost entirely upon the specification, and there was, speaking with great respect, a cardinal error committed by Lord Justice *Giffard* in not adverting to what is the true rule of law with respect to a disclaimer, and its effect on the specification. But it may be right in a few words to explain the nature of the invention, and its utility, before we come to the construction of the patent.

The evils of the pot-furnace system, as it is called, the only apparatus known, previously to the invention now in question, principally consisted in this: The pots were large crucibles, constructed at great expense, and they were placed usually four together, upon large benches or supports, with a huge fire kindled immediately beneath them. They were heated to a white heat, no less degree of heat being sufficient for the melting of the crude materials for making glass that were piled within the pots. The pots frequently amounted to two tons in weight, independently of the metal with which they were charged. They were constructed of *Stourbridge* clay, or some other kind of fire-clay; and the effect of the heat was such that they were constantly exposed to cracking, and to having fissures in the sides and bottoms, whereby the whole operation of melting was frequently lost. The only mode of moving them was by means of an instrument called "calipers," a huge instrument like a pair of pincers, to lay hold of the pot to remove it from its locality, and to expose it to the external air. It was found, if there was a fissure in the pot through which the melted glass was escaping, that when exposed to the open air the glass congealed, and in effect stopped the fissure. The consideration of these evils sug-

gested to an intelligent foreigner a mode of removing them. This became known to the gentlemen who are now the Appellants, and also to the Respondent. They negotiated for the patent, and the patent was finally taken out in this country.

The object of the patent was to secure an apparatus which should consist of these three principal ingredients or parts: First of all, a tank was substituted for the pots, and the tank was suspended over an open space, denominated a cave. The bottom of the tank was not immediately over the fire, as the bottom of the pots had been, but the fire was placed on either side of the tank. That was the second point. A tank first, instead of pots, then the fire placed laterally to the tank instead of immediately beneath it. The furnace was so made that the flames from the furnace met at the top of the tank, thereby producing a very greatly augmented heat, and in reality being a substitute for the heat that was formerly applied to the bottom of the pots; so that the metal in the tank was, in reality, principally heated from the aggregated heat produced by the reverberatory effect of the flames passing over the top of the tank. Then the third and principal portion of the apparatus was this—the forming of a channel all around the tank, in order that the atmospheric air might circulate freely. The effect of that was, that it operated at once as a prevention of accident by fissure, and also as a remedial or self-healing operation whenever any accident occurred. It operated by way of prevention, by keeping the external surface of the sides of the tank cooler than the interior, and thereby preventing fissures in the tank. It operated also by way of a self-healing process, because, immediately upon the fissure opening, and the glass escaping through the crack, it met the atmospheric air circulating through this chamber, and the coolness of that air congealed the glass and healed the crack. These were the three principal objects, which were to be united together, and the apparatus resulting from the union of the three was the improved apparatus to be used in the manufacture of glass.

Now, the only thing that appears to have been regarded by the patentee, Mr. *Pocheron*, as a new discovery (apart from the apparatus), was the application of the external air to the sides of the tank. It was a discovery, certainly, but it was a thing for which, independently of the other apparatus, probably no patent could have been

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obtained. I may construct an apparatus, and may, in point of fact, make the merit and the benefit of that apparatus depend upon the application of some natural force or property which is perfectly well known; but my invention consists in the construction of the apparatus in such a manner as to bring the natural agency or power to bear upon and effect the object which I desire to effect, and that I do by means of an apparatus constructed so as to bring into action that natural power. If, for example, I avail myself of the well-known expansive force of steam, in order to effect a new object or a more beneficial result, and I introduce that by means of an apparatus constructed for the purpose of bringing this well-known expansive power into utility for my particular purpose, I have no right of invention in the discovery of that expansive power. My invention consists in the arrangement of the apparatus in order to receive that ordinary and well-known dynamic agent, and make it a fit instrument for effecting a new result. Here the refrigerating effect of the air upon the sides of the tank was not a thing for which, *per se*, a patent could be claimed, but an apparatus so constructed as to bring into operation that particular property of the external atmospheric air, so as to produce a most useful effect, constitutes an invention to which the merit of novelty attaches, and for which a patent may be taken out. These three points were in some degree, I am afraid, lost sight of by the Lord Justice, although they are perfectly familiar to all who are acquainted with Patent Law.

The invention consisted in the things I have mentioned. There was the tank. That was one element. There were the furnaces placed at the side instead of being placed below. They were so constructed as to be reverberatory. Above all, there was a channel for the introduction of cool air from the cave below (that is, the open space at the bottom of the tank) to circulate around the sides of the tank, and prevent accidents arising from the bursting of the tank. Now, all these things were embodied by Mr. *Pocheron* in his original specification, and they are well described in very few words in the provisional specification. In fact, the provisional specification is, to my mind, almost as good as the detailed specification under the patent. The provisional specification says this:— [His Lordship read it, see *ante*, p. 206.] It is there, I think, very

accurately, as well as very shortly, described, and I advert to it because some attempt was made, in the argument in the Court below, to make out a difference between the final specification and the provisional specification, and to establish upon that ground an objection to the patent.

I come now to the original specification under the patent, and I must confess that I think it was a very unnecessary amount of nervous timidity with regard to this specification which led to the disclaimer. It is impossible to read the original specification, before the disclaimer, without observing that the object is to describe an apparatus or combination. It is the apparatus, the machine, the combination of the separate parts, which is the subject of the invention, and which, of course, constitutes the merit of the discovery. Originally Mr. *Pocheron* had said that his improvements consisted *in* the suppression of the fire-clay pots, and in placing the material to be fused or melted within the furnace itself. That preposition "*in*" appears to have led to some misapprehension, and accordingly it was the cause of the subsequent disclaimer.

Here, my Lords, I must pause for a moment, because, unfortunately, the Lord Justice did not observe where the disclaimer begins, and he has confounded the introductory part, or the reason for the disclaimer, with the disclaimer itself. He has taken the preface and the reason given for the thing that was done, as if that preface and that reason had become incorporated into the specification by the operation of the disclaimer. The whole of his reasoning is founded upon the language contained in that introduction, and upon the gratuitous assumption that the statement which is introductory of the disclaimer was a part of the disclaimer itself, and became by the operation of the disclaimer a constituent and leading part of the amended specification. My Lords, this was a very great error. The reason for a disclaimer is no part of the disclaimer itself. Now, the operative part of the disclaimer begins in this way: "I for this reason wish to disclaim, and do hereby disclaim." Then he disclaims all parts of the said specification which claim the suppression of the fire-clay pots, and placing the materials to be fused or melted in the furnace itself. Then follows the memorandum of alterations. Now, what the Lord Justice did

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was this: He read as part of the disclaimer, and as belonging to the disclaiming part of the amended specification, the following words: "I desire to limit my claim to the forming the sides of the tank or chamber containing the glass-making materials hollow, in such wise that a current of refrigerating air may circulate and prevent any excessive heating of the sides which retain or enclose the fused materials." The whole criticism of the Lord Justice, and the whole of the difference between the Lord Justice and the Master of the Rolls, consists in this, that the Lord Justice, holding these words, "I desire to limit my claim," &c., to be part of the description of the invention, and to have become incorporated into the specification, complains of the Master of the Rolls that he did not instruct the jury that the claim was limited by the patentee himself in the manner I have already read, and did not tell the jury that that was the invention, and that the invention did not reside in the combination, as the Master of the Rolls had put it. It was a mistake of the law. That is no part of the disclaimer. It is the reason for the disclaimer, but it is no part of the specification by virtue of the disclaimer. Accordingly not one single word of this introductory passage is found in the amended specification. The amended specification, as set forth by the patentee, embodies the memorandum of alterations, but nothing more. In truth, these introductory words, when rightly understood, even if they had been made a part of the specification, ought not to have received the interpretation which Lord Justice *Giffard* gave them, because the words were intended only to say this: "My specification, as it is at present worded, seems to me to contain, or I fear that it may be read as containing, first, a claim to the suppression of the fire-clay pots; and, secondly, a claim to the placing the materials within the furnaces itself. It may," says the patentee, "be so interpreted, and therefore I desire to repudiate that interpretation, but I do not repudiate whatever may be the conclusion with regard to the remainder of my specification, because, in reality, that is my discovery." These words limiting the claim are, when rightly understood, no more than this: The patentee says, "In the introductory part of my specification there are two things which, I think, are erroneously represented as part of the invention, but the remaining third thing is correctly represented

as a discovery, and is part of the invention." Then, if the Lord Justice had observed what that discovery was, namely, the introduction of the atmospheric air, he would at once have been conducted in his mind to the mechanical arrangement made for the purpose of effecting that object, and he would have found that mechanical arrangement to be a part of the entire combination, a part of the whole furnace or kiln, which is described in both the original and the amended specifications as the improved furnace or kiln, which is the subject of the patent, and is, in point of fact, the discovery of the patentee.

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It is very much to be regretted, my Lords, that through an accidental mistake of this kind parties should have been thrown upon a wide sea of litigation and expense; whereas, in point of fact, if the matter had been originally carefully examined, it would have been seen that the Master of the Rolls was right in putting the invention for which the patent was claimed simply as a combination; and, moreover, it would have been seen from the very nature of the thing itself that the merit of the invention must lie in the improved kiln, or furnace, constituted mainly of the three integral parts that I have described, and which are brought all into correlative action for the purpose of getting a better manufacture of glass; and in the three taken together, and not in any one of the three taken separately, lies the utility, and lies the novelty of the invention.

I have only now to advert for a moment to the question of the infringement, and it is material to advert to this, because very considerable ingenuity has been shewn by the Defendant, and by the counsel for the Respondent, in attempting to rescue his combination from the reproach of being an imitation or an embodiment of the combination of the Appellants. Say the counsel for the Respondent: You are greatly mistaken in supposing that we have the same object that you have, or that our combination was prompted by the same consideration of the evil to be remedied, or by a desire to attain the same result as your combination is directed to. Your combination has for its object the keeping cool the material portion of the furnace or kiln, the combined machine, which would be liable to be destroyed by heat. Our combination, on the contrary, is intended to intensify the heat, and accordingly they say:

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These channels which you describe as an imitation of your channels have nothing at all to do with refrigeration. They conduct the atmospheric air in a heated state to the top of the furnace, and then they inject oxygen by means of the heated atmospheric air into the products of combustion, that is, the body of vapour and smoke and flame which issues from the furnace. That has the effect of greatly augmenting the intense heat of the furnace below, and therefore it usefully consumes the smoke and vapour of the furnaces, and does away with the necessity of using a greater amount of fuel, and accomplishes the object of melting the glass.

I do not mean to deny that that may possibly be an improvement upon the Appellants' combination. But we all very well know that if you are obliged to adopt a combination of machinery which originally is directed to one purpose, before you can make it minister to another and additional purpose, the user of it for this additional purpose is an infringement of the patent which first introduced that combination. And we find this sort of infringement to be substantially admitted in the argument. The Master of the Rolls compliments the witnesses in this case; and I may here say that I think the learned counsel have argued this matter, not only with ability, but with a degree of candour and openness quite equal to their ability. I find, I say, this sort of infringement admitted by Mr. *Webster* in argument before the Master of the Rolls. He says, "In conducting the air through my channels in order to make it arrive at the top of the furnace, and then projecting it into the mass of vapour and flame that I find here, I cannot deny but that in that process I do *pro tanto* cool the sides of the furnace. But then we find that the sides are cooled just where the cooling process is required." If there had been no intention to pirate this invention these channels for the air might have been conducted behind the furnace, or they might have been brought in at an elevation above the sides of the tank; but instead of that we find that the channels which, by the Defendant, are directed for the admission of air, not at all, as he says, for the purpose of refrigerating, are placed exactly where refrigeration is required. We find them permeating the body of the tank, or running along the sides of the tank, between the tank and the

lateral furnaces on either side. Now that locality of the channels of air is adopted plainly for the purpose, first of all, of cooling the sides of the tank, and then, heat being gathered from that process of cooling, the heated body of atmospheric air ascends, and then performs the additional function of augmenting and intensifying the combustion. There can be no doubt that there is refrigeration; and there can be no doubt that if there be any merit in the Respondent's discovery it is a super-addition to the merit of the Appellants' discovery, it is a thing added to the process of the Appellants, it is a thing effected by means of the combination and arrangement made by the Appellants. It embodies the Appellants' apparatus, and therefore becomes in law a piracy of his invention. I have no hesitation, therefore, my Lords, in stating, without going farther into the case, that I have no difficulty in adhering altogether to the judgment of the noble and learned Lord.

My Lords, I do not go into the question of novelty, because I hold that it would be very improper to do so after the verdict of the jury, upon whose verdict, and whose examination of the matter, no sort of imputation has been cast, except this, that the jurors approached the question with very imperfect instruction, or, rather, with misleading instruction given them by the learned Judge. If that be not the fact, then you have an intelligent and competent jury, with an intelligent and competent Judge rightly directing that jury; and then, my Lords, I must give the jurors credit for having understood, and having come to the right conclusion upon a matter which is peculiarly within their province, namely, the novelty and utility of the invention.

I think, therefore, upon all grounds, that the decision of the Lord Justice is wholly erroneous, and that the summing-up of the Master of the Rolls was sufficiently sound and comprehensive, and that the verdict of the jury is one on which I think we have a right to depend, and which we ought not by any means to assume to ourselves the power of disturbing, inasmuch as it has been pronounced by the proper and legitimately constituted tribunal.

LORD COLONSAY :—

My Lords, it would be unpardonable in me to occupy your time in going through the particulars of this case after the exhaustive

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manner in which it has been treated by both my noble and learned friends. I concur in the construction, put upon the letters-patent and upon the disclaimer, by the Master of the Rolls in his charge to the jury; it was a sound construction, and there is nothing in the letters-patent which I can construe otherwise; nor do I see any error in point of law in his direction to the jury. Being of that opinion in regard to that part of the case, I concur in what has been said as to the inexpediency, even if I saw grounds for doubt, of disturbing the verdict of the jury upon the questions of the novelty and utility of the patent.

On the question of infringement, I confess at one period I did entertain some doubt. An ingenious criticism was made upon the precise terms of the disclaimer and the recorded specification by the counsel for the Respondent who spoke second, and I did think it necessary to call the attention of *Mr. Grove* to those words, and to ask what degree of importance he attached to them. The words I allude to are these—it is set forth by the patentee in his specification and in his disclaimer that his invention consists of so-and-so—"But according to my invention the lateral sides are constructed of hollow form, in such wise that a current of refrigerating or cooling air may be made to circulate around and prevent any excessive heating of the sides which are to retain or inclose the materials in fusion." Now the sides that are to contain the materials in fusion were assumed by the counsel for the patentee to have been the backs of the furnace, and a portion of the refrigerating air was made to pass round that; and I took the liberty of asking *Mr. Grove* whether he considered that an essential or important part of his patent. He rather seemed to me to intimate that it was—at all events he did not give a sufficient explanation, to my mind, as to how that was consistent with the contention that the Respondent's process, which did not produce such a circulation, was an infringement of his, as I understood it to be admitted that there was no such open space at the back of the Respondent's furnace, where the cooling air, if any, was obtained from the outside through the external walls of the kiln. But, notwithstanding that difference between the operation of the two processes, and the difference in the construction of the two kilns, I think that this mode of conducting the air up through the channels at each side,

between the furnace and the tank, is a most essential part, indeed the main part, of the patentee's invention. And although he closes the top of these passages and, according to the words of his patent, makes the air circulate around, yet the result of the process of the other party is to adopt that portion of his construction of the kiln, and turn it to an account which, I think, does, to a certain extent, operate the same results as those of the patentee. I think he has there taken an essential part of the process of the patentee, and the consequence is, that his process in that respect infringes upon that of the patentee. I do not say that the invention of the Respondent may not be an improvement, possibly a very material improvement, on the patent of the Appellants. But that would be a ground for obtaining a separate patent for an improvement on one that already exists. It occurs constantly in practice that a party takes out a patent for new improvements, and he is obliged to deal with the patentee who has a previous patent for the portion of his patent which he wishes to adopt. The well-known patent of the hot-blast was alluded to in the course of the argument, with respect to which a gentleman discovered a mode by which it might be applied to utilising a large portion of the coalfields of this country and of *Wales*, which were not formerly used for the purpose of fusing iron. And there are many other instances. But that is not what we have here to deal with. We have to deal with the case of a party infringing a patent which I hold to be good and to be well expressed. And therefore I think that the judgment of the Master of the Rolls should be affirmed.

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Order of the Lord Justice Giffard of the 28th of January, 1870, discharged, and Order of the Master of the Rolls of the 16th of December, 1869, affirmed; and the Respondent directed to pay the costs of the motion before the Lord Justice Giffard upon which the Order hereby discharged was made.

Lords' Journals, 12th June, 1871.

Solicitors for the Appellants: *Wilson, Bristows, & Carpmael.*

Solicitor for the Respondent: *W. W. Wynne.*

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June 26, 27.

JAMES W. B. SCOTT PLAINTIFF IN ERROR;

AND

JOHN N. BENNETT DEFENDANT IN ERROR.

Error—Practice—Costs—Discharge of Jury.

The decision of one of the Superior Courts pronounced on motion (unless where otherwise provided by statute) is not the subject of a proceeding in error.

A statute which declares that a particular course of proceeding shall not be necessary, in effect renders that course of proceeding mere surplusage.

A Court has power to discharge, by consent, a jury from giving a verdict upon any of the issues in a case; and where the jury has been discharged, and the record does not shew that it was done without consent, the discharge must be taken to be regular, and cannot be made the ground of error.

In like manner, where a Court has power to give costs upon a certificate or order, and it does not appear (apart from a suggestion of error in fact) that there was no certificate or order, the taxation by the Master cannot be impeached by a proceeding in error.

Banks v. Newton (1) overruled.

Per LORD CHELMSFORD:—Where the Defendant could, before judgment, have suggested the matter afterwards alleged as error, he cannot, by his subsequent suggestion of it, release himself from costs.

THIS was a proceeding in Error on a judgment given by the Court of Exchequer Chamber in *Ireland* (2).

Mr. *Bennett*, of *Gortnaclea*, in the *Queen's County*, was possessed of a mill and premises near a stream; and he brought an action, in the Court of Common Pleas, against Mr. *Scott* for disturbing him in the enjoyment thereof.

The declaration, as required by the 9th section of the 16 & 17 Vict. c. 113, gave the names and residences of each of the parties, and the cause of action was set forth in four counts.

The Defendant pleaded several pleas, some traversing the Plaintiff's right, and some being pleas of justification.

Twelve issues were prepared from these pleadings.

The case came on to be tried at the Summer Assizes of 1861, at *Maryborough*, before Lord Chief Justice *Lefroy*; but before the trial had proceeded far, the cause was referred to the arbitrament

(1) 11 Q. B. 340.

(2) Ir. Rep. 3 Com. Law. 217.

of three gentlemen who had been summoned on the jury. The agreement of reference provided that the Registrar of the Chief Justice should enter the verdict for either party, and fill up the issue paper according to the findings.

The arbitrators entered on their duties, and having made certain findings, the postea was entered up by the Registrar, who entered the verdict as for the Plaintiff, and filled up the issue paper; and the Lord Chief Justice signed the postea, and returned the record of Nisi Prius, with the postea indorsed thereon, to the Court of Common Pleas. The postea was in the usual form, and gave the names of the jurors, "who being balloted for and sworn to declare the truth of the within issues, upon their oaths say, as to the first issue, that," &c. In this form findings were stated as to seven issues, and the postea concluded thus: "They assess the Plaintiff's damages on the second count to fifty shillings sterling, and for his expenses and costs to sixpence sterling; and the jury are discharged from finding any verdict on the 8th, 9th, 10th, 11th, and 12th issues; wherefore," and so forth.

After the filing of the postea the attorney for the Plaintiff, according to the form required by the 124th section of 16 & 17 Vict. c. 113, delivered to the proper officer a summary of the proceedings, and signed judgment in the usual manner in these words, "Whereupon, &c., it is considered that the Plaintiff, *J. N. B.*, do recover against the Defendant, *J. W. B. S.*, his damages aforesaid to £2 10s. 0d., found for the Plaintiff on the second count, and also for his expenses and costs the sum of 6d., by the jury aforesaid in form aforesaid assessed, and also the sum of £—, adjudged by way of increase to the Plaintiff," &c. The Plaintiff's attorney then proceeded to a taxation of costs; but the Taxing Master declined to enter on the taxation of costs of increase, on the ground that the Plaintiff had only recovered £2 10s., and that the Chief Justice had not given any certificate, pursuant to the 97th section of the 19 & 20 Vict. c. 102, *The Common Law Procedure Act (Ireland)*, 1856 (1).

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(1) By which it is enacted that, "If in any action for any wrong or injury disconnected with contract, (not being for replevin, slander, libel, malicious

prosecution, seduction, or criminal conversation), the Plaintiff shall recover, exclusive of costs, a sum not exceeding £5, the Plaintiff in any such action shall

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Bennett thereupon applied to the Court of Common Pleas for an Order, which, on the 30th of May, 1862, was granted by that Court in these words: "The Court doth hereby certify and declare that this case, although coming within the provisions of the 14 & 15 Vict. c. 57 (both parties being resident within the same jurisdiction), was nevertheless a fit and proper case to be tried in one of the Superior Courts" (1). The costs were then taxed, and amounted to £208 5s. 10d., and this amount was afterwards inserted in the record.

Scott upon this applied to the Court to amend the record, by striking out the costs of increase, or to have leave to file a suggestion. The motion was refused. He then filed a memorandum of error in fact, which in substance set forth that both the parties resided within the same jurisdiction, that of the Civil Bill Court of the *Queen's County*; that the cause of action arose there; that the Plaintiff had only recovered £2 10s. damages; and that no certificate had been indorsed by the Judge on the record to shew that it was a fit cause to be tried in a superior Court.

Bennett pleaded to the assignment of error that "there is not any error in the above record and proceedings, because after the

not be entitled to any costs, unless, at the trial of such cause, the Judge shall certify on the back of the record, either that the case was one which could not have been tried in the Civil Bill Court, or that, although within the jurisdiction of the Civil Bill Court, it nevertheless was a case fit to be tried in one of such Superior Courts; or (in case there shall be no trial), unless the Court or a Judge shall, on motion, make an order to the like effect; and in case there shall be no such certificate or order, it shall not be necessary to enter any suggestion upon the record to deprive such Plaintiff of costs."

(1) By the 40th section of the 14 & 15 Vict. c. 57 (the *Civil Bill or Small Debts Act of Ireland*), it was enacted that "If in any action, brought after the commencement of this Act, in any of Her Majesty's Superior Courts of Record in *Dublin*, where the parties to the pro-

ceedings reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen, the Plaintiff shall recover, for debt or damages, a sum not exceeding £5, the Plaintiff in any such action shall not be entitled to any costs, unless at the trial of such cause, the Judge shall certify on the back of the record, either that the case was one which could not have been tried in the Civil Bill Court, or that, although within the jurisdiction of the Civil Bill Court, it nevertheless was a fit case to be tried in one of such Superior Courts, or (in case there shall be no trial) unless the Court or a Judge shall, on motion, make an Order to the like effect; and, in case there shall be no such Certificate or Order, it shall not be necessary to enter any suggestion on the record to deprive such Plaintiff of costs."

swearing of the jury, and before the cause was opened before the said Justices, &c., and without any trial of the said cause being had, the cause was referred by a consent in the words and figures following," &c. The agreement to refer was then set out, and then the award; and then it was alleged that the cause was referred back to the arbitrators that "they should insert in the issue paper replies to the several queries contained therein." These queries, with their answers, were set out, and then came the words:—"To the 8th, 9th, 10th, 11th, and 12th issues, discharged from finding on them." The names of the arbitrators were appended to these answers and this addition. The plea went on to allege the farther proceedings, and the Order of the Court made as above stated.

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Scott filed a replication to this plea by way of estoppel, alleging that *Bennett* ought not to be allowed to aver matters contrary to the record, which alleged matter shewing a trial before Lord Chief Justice *Lefroy*, and the replication set forth the judgment and the postea as entered up and signed by the Chief Justice.

Bennett, in June, 1864, demurred to this replication. There was a joinder in demurrer; and the Court gave judgment for *Bennett*, the Plaintiff, Mr. Justice *Christian* dissenting from the rest of the Court. On error to the Exchequer Chamber this judgment (*diss.* Lord Chief Justice *Whiteside*) was affirmed (1). Error was then brought to this House.

The Judges were summoned, and Mr. Baron *Martin*, Mr. Justice *Willes*, Mr. Justice *Blackburn*, Mr. Justice *M. Smith*, Mr. Baron *Cleasby*, and Mr. Justice *Hannen* attended. When the case was heard on the second day, Mr. Justice *Byles* attended in the place of Mr. Justice *Willes*.

Mr. *Macdonogh*, Q.C., and Mr. *P. Martin* (both of the Irish Bar), for the Plaintiff in Error:—

The plea to the assignment of error was bad. It admitted all the facts, and merely denied that there was error; and, having admitted the record, which set forth that there had been a trial, it went on to contradict that record by alleging that there had

(1) Ir. Rep. 3 Com. Law. 217.

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been no trial, but only an arbitration. This was irregular and inadmissible. A decision by arbitration on an order of reference is equivalent to a verdict at a trial: *Paxton v. The Great North of England Railway Company* (1); *Burgess v. The Guardians of Mitchelsbourn Union* (2); *Cooper v. Pegg* (3). Being a verdict, it must be followed by all the incidents of a verdict: *Moore v. Watson* (4). If there had been a trial, then the certificate of the Judge before whom the trial took place was absolutely necessary to give the Plaintiff a right to costs. There was no such certificate here, and nothing could supply its place. The Court had no jurisdiction to grant a certificate where the Judge at the trial had not granted any. A certificate granted by an arbitrator where, even by a rule of Court, a Judge is required to grant it, is not sufficient: *Astley v. Joy* (5). It must be, *à fortiori*, insufficient where the certificate is required by statute to be granted by the Judge. Here the very words of the statute require the Judge to grant it at the trial, and do not give a general power of granting a certificate to the Court, but expressly limit the power of the Court on motion to granting certificates in those cases where there had been no trial. Here there had, in law, been a trial, and it was so stated on the face of the record. The Chief Justice had not indorsed the certificate on the *postea*; the Court had pronounced judgment on that *postea*, and having done so, it had no jurisdiction afterwards to treat the case as if there had been no trial, and assume a power to grant a certificate under circumstances which the words of the statute did not recognise. The *postea* described a trial and verdict. That being so, the Plaintiff was estopped from contradicting it. The replication, therefore, was perfectly good, and the demurrer to it ought to have been overruled.

It is not disputed that an appeal will not lie for costs only where those costs are in the discretion of the Court,—but, as was decided in this House in *Tod v. Tod* (6), where the Court is directed by an Act of Parliament to give costs, it is a proper subject of appeal if they are not given according to the requisitions of the Act. They were not so given in this case, and the assignment of error

(1) 8 Q. B. 933.

(2) 4 Ir. Com. L. Rep. (N. S.) 566.

(3) 16 C. B. 264.

(4) Law Rep. 2 C. P. 314.

(5) 9 Ad. & E. 702.

(6) 1 Bl. (N. S.) 639

in the Court below properly set forth the facts, which shewed that the statute had not been complied with.

It is clear that the proceeding taken here was utterly informal, and the words of Mr. Baron *Bramwell* in *Smith v. Edge* (1) apply, "If this had been a verdict actually pronounced by the jury, it is conceded that the Plaintiff would not be entitled to costs, and if there were an assessment of costs upon the record, it would be error." *Banks v. Newton* (2) is a most important case: it was the subject of two decisions in the Court of Queen's Bench. In the first instance there had been a verdict for the Plaintiff for the sum of £4 18s. in respect of the debt, and 1s. in respect of costs. The Defendant applied for leave to enter a suggestion on the roll to deprive the Plaintiff of costs under the *Surrey Court of Requests Act*, and in this application he set out the fact that he resided at *Briatton*, in *Surrey*, though for the purposes of business he had chambers at *Manchester Buildings, Westminster*. The Court thought that (as shewn by the evidence at the trial) the Defendant had by his own conduct misled the Plaintiff into believing that he, the Defendant, resided in *Manchester Buildings*, and if a different residence was to be relied on, the objection ought to have been taken earlier, and the rule for entering a suggestion was discharged. The Defendant brought error *coram nobis* (3), and assigned the facts, set forth in his application to enter a suggestion, as grounds of error. The Plaintiff pleaded to this assignment *in nullo est erratum*. The Court held that on the record as it stood the facts were admitted, and the cause assigned for error was sufficient; whereupon the judgment was reversed. That case must govern the present, and there, too, the fact of residence was something which had to be brought to the notice of the Court by matter extrinsic, while here, in obedience to the provisions of the 16 & 17 Vict. c. 113 (*Ir.*), it appears on the face of the record itself (see *ante*, p. 235). There, too, a motion to enter the suggestion had been made and refused. The fact, however, appeared on the assignment of error, and the Court held that that was sufficient, and that the Plaintiff, if he desired it, should have traversed it; but that saying merely *in nullo est erratum* admitted the fact, which was decisive

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(1) 2 H. & C. 665. *per* 451380 (2) 4 D. & L. 632.

(3) 11 Q. B. 340.

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against him (1). On that pleading the judgment of reversal proceeded. *Ricketts v. Noble* (2) is a strong authority to the same effect. Where the party had not, as he had not here, the means of setting up the objection in the Court below, he is entitled to set it up by way of error: *The Mercers of Chester v. Bowker* (3), where the fact was a fact *dehors* the record. That was founded on the *City of London v. Wood* (4), where the fact assigned was also one out of the record. [LORD CHELMSFORD:—Here the Act says (s. 97), that “in case there shall be no certificate, it shall not be necessary to enter any suggestion.” Does not that, in effect, abolish the suggestion?] No; it may not always be necessary, but it is always permissible; and if so it may be entered where the circumstances require it. Though a party may not be bound to file a suggestion, he may file it if his interests require him to do so.

Error lies in this case, for though error may not lie on a judgment pronounced on mere allegations of fact, it may lie on a wrong decision founded on an allegation of fact, but so framed as to constitute error in Law: *Irwin v. Grey* (5).

A general submission to arbitration binds the parties as to all the terms virtually included in the original submission: *Evans v. Thomson* (6). It follows, of course, that if those terms are not observed, the party is not bound. Here one of the terms was, that the arbitrators should find on all the issues stated between the parties; they found only on seven of those issues: as to the remaining five, they discharged themselves from finding anything. That is the natural meaning of the words used in the postea; the arbitrators find seven different issues, and then say, “To the 8th, 9th, 10th, 11th, and 12th issues, discharged from finding on them.” This was plainly beyond their power: *Powell v. Sonett* (7). Although the Court may discharge jurors from finding on immaterial issues, they cannot discharge themselves. But if it is said that the words mean that the Judge discharged them from finding on those issues, then the answer is, that he could not do so without

(1) But see *per* Lord Chancellor Chelmsford, *Irwin v. Grey* (Law Rep. 2 H. L. 23), and the note there given, n. (1).

(2) 3 Ex. 521; but see 4 Ex. 260.

(3) 1 Str. 639.

(4) 12 Mod. 690.

(5) Law Rep. 2 H. L. 20.

(6) 5 East, 189.

(7) 3 Bing. 381; 1 Bli. (N. S.) 545; 1 Dow. & Cl. 56.

consent, and no consent is in any way whatever alleged on the record. Where any power is given by statute it must be exercised according to the very words of the statute; and therefore where a statute contemplated only a prospective order to be made by justices, and the order as framed appeared to be retrospective in part, that part was quashed: *The King v. St. Nicholas Leicester* (1).

This order is bad upon another ground; it was made after the judgment itself had been impeached, and therefore cannot be supported. It is also defective in form, for though intended to operate as an order, it orders nothing, but only declares that the case was a proper one to be tried in a superior Court. It could not, therefore, have any effect on a judgment previously obtained. The principle adopted by this House in the *Earl of Glasgow v. The Hurler Alum Company* (2), must be applied here, and the Court can only look to the record, and cannot receive any explanation of it. In *Ramsbottom v. Buckhurst*, Lord *Ellenborough* (3), in very strong terms, refused to admit anything to contradict the record. *Molins v. Werby* (4) had long before decided the same point, and from that time to the case of *The King v. Carlile* (5) that had been the invariable rule. The Court of Common Pleas had therefore no jurisdiction three months after the trial to make a declaration which was in substance a denial of the allegation on the face of the record, and the exercise of a power which could only be lawfully exercised at a different and a long anterior time. [LORD CHELMSFORD:—The 97th section does not say “shall recover on the trial,” but merely, “shall recover;” in which respect the words differ from the English statute.] But both have the same object in view. A Defendant need not negative any grounds for refusing a suggestion which are not mentioned in the Acts; a *prima facie* case is sufficient to entitle him to enter a suggestion: *Butler v. Corney* (6). The words of Baron *Rolfe* in that case (7) are very strong on that point. *Marriott v. Stanley* (8) is to the same effect.

Mr. *Huddleston*, Q.C., and Mr. *Palles*, Q.C. (of the Irish Bar), were for the Defendant in Error, but were not called on.

(1) 3 Ad. & E. 79.

(2) 3 H. L. C. 25.

(3) 2 M. & S. 565, 567.

(4) 1 Lev. 76.

(5) 2 B. & Ad. 971.

(6) 2 Ex. 474.

(7) Ibid. 478.

(8) 2 Scott, N. R. 60.

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At the conclusion of the argument for the Appellant,

LORD CHELMSFORD said :—

My Lords, this case has been very fully and very ably argued by the learned counsel for the Plaintiff in Error, but probably your Lordships will be of opinion that before you call upon the counsel for the Defendant in Error to argue, you would wish to have the opinion of the learned Judges upon two questions which I propose to submit. First, whether the Order of the Court of Common Pleas, upon which the taxation of costs took place, was subject to review by proceeding in error; secondly, whether there is error apparent upon the record in the statement that the jurors were discharged from finding upon some of the issues.

The Judges retired for a short time to consider the questions. On their return

MR. BARON MARTIN said :—

My Lords, I am authorized by my learned brethren to deliver answers to you on the two questions which you have submitted to us, and I am able to state that my Brother *Willes*, who heard this argument yesterday, is of the same opinion, and that we, therefore, unanimously answer these questions.

The first question is, whether the order of the Court of Common Pleas, upon which the taxation of costs took place, was subject to review by proceeding in error? We are unanimously of opinion that it is not.

It is quite true my Lords that the writ of error formerly, and proceedings in error now, are matters of right; and that it is the right of all Her Majesty's subjects to maintain error. But it is still the question, what is the subject of a proceeding in error? It is not every mistake that may be made in the administration of justice that is the subject of error at all; but, on the contrary, error is confined to judgments, or to something analogous to judgments, and until a late Act of Parliament there were, and now are, many of the most important matters discussed and decided in Courts of Law on motions, especially motions for new trials, and for entering verdicts, with respect to which the rule was, and ever

had been, that upon the decisions on such rules error did not lie. This was altered to some extent by statute.

By the *Common Law Procedure Act* of 1854, an appeal was given on certain rules ; but the rule is now, and ever has been, that upon decisions on motions error does not lie. Your Lordships will find that laid down in all the books of practice, and also in well-known cases, which are of considerable importance—I allude more especially to the case of *Richardson v. Mellish* (1). The Judges lay down in the strongest terms that upon decisions on motions error does not lie.

But the question here really depends on the 97th section of the Act of the 19 & 20 Vict. c. 102. After providing with respect to actions of contract, that section goes on to provide that in any action for any wrong or injury disconnected with contract (subject to certain exceptions), in which a verdict is given for “a sum not exceeding £5, the Plaintiff shall not be entitled to any costs unless at the trial of such cause the Judge shall certify;” or if there be no such certificate, “unless the Court or a Judge shall, on motion, make an order to the like effect;” and the section concludes by enacting that “in case there shall be no such certificate or order, it shall not be necessary to enter any suggestion on the record to deprive such Plaintiff of costs.”

Formerly, my Lords, the costs of a Plaintiff were given in pursuance of the *Statute of Gloucester*, which gave costs to the Plaintiff without exception. But very soon afterwards there were various exceptions introduced, principally for the purpose of stopping frivolous actions ; and a Plaintiff unless he recovered damages to a certain amount was not entitled to costs. The original mode of proceeding in regard to that was by entering a suggestion on the record, and that suggestion became a portion of the record as much as any other portion of the proceedings.

Your Lordships will find the law upon that point laid down most clearly by Lord *Abinger*, in delivering the judgment of the Court of Exchequer, in the case of *Watson v. Quilter* (2). Nothing can be more clear than Lord *Abinger*’s judgment in that case ; and it amounts to this, that when the *Statute of Gloucester prima facie*

(1) 3 Bing. 334 ; 7 B. & C. 819 ; 1 Cl. & F. 224 ; see also *Scales v. Cheese*, 12 M. & W. 685.

(2) 11 M. & W. 760.

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entitled a Plaintiff to costs, it was necessary, in the event of any other judgment being given by the Court than one granting those costs, that a suggestion should be made upon a rule to justify the Court in giving that judgment. But proceedings by suggestion were found to be practically intolerable, because they caused great expenses to be incurred, for they enabled an obstinately litigious litigant to protract the proceedings beyond all bounds. The consequence was, that many years ago the Legislature took the step which has been taken in this Act to do away with the necessity for a suggestion for costs at all, or, in other words, to enact that the facts upon which the costs were given need not appear on the record; and as a necessary consequence of that, that if a matter of dispute arose with respect to those costs it must, of necessity, be by motion and rule. There are no other modes by which it can be decided, and, in point of fact, in the subsequent enactment no suggestion upon the record is necessary, but the Act declares in substance that this matter shall be discussed on motions and on rules. That is the foundation of our judgment in this case.

My Lords, the facts in this case are extremely simple. The action was brought by a writ of summons and plaint containing four counts with reference to a water right. The cause was not tried in the popular sense of the word. On the contrary, it was referred to the arbitration of three of the jurors. I was not aware how the paragraph with respect to the entering of a verdict came to be so put. But it is perfectly clear from a case which occurred in one of the Irish Courts how it came to be so put, for it is in exact pursuance of a rule. But no rule can alter the nature of the thing; and the real nature of the thing was a reference to arbitration. And upon that taking place the Lord Chief Justice *Lefroy* had done with the case—the case was at an end as far as he was concerned.

The next step was that an award was made—that award was found defective, and the step taken upon that was to apply to the Court of Common Pleas to make a rule that it should be sent back to the arbitrators to be corrected. The defect was that there was no finding upon the issues, and thereupon, not by an order of the Lord Chief Justice, but by the Court of Common Pleas, it was sent back to the arbitrators to be completed, and they did complete it;

and then, in pursuance of the rule that was read this morning, it was put into the shape of a *postea*, as it is called. The Registrar of the Lord Chief Justice entered the verdict correctly enough, in conformity with the finding of the arbitrators.

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The next step in the case was, that there was an application by the Plaintiff to have judgment signed. In this country the attorney himself signs judgment, but it appears that the practice in *Ireland* is different, and that some step is taken before the Master of the Court—but that step is an *ex parte* step. It is taken by the attorney for the Plaintiff, and the attorney for the Defendant has nothing whatever to do with it. It is done by the attorney for the Plaintiff, in some degree under the control of the Master, but still it is *ex parte*.

The result was, that judgment was signed some time in January, and it is perfectly obvious what took place. There was a dispute between the parties as to the costs. The matter was in dispute for some time. Your Lordships' question refers to the rule of the Court of Common Pleas of the 30th of May, 1862. That rule was upon a motion. "On hearing Mr. *Macdonogh*, with whom was Mr. *Martin*, of counsel for the Defendant, the Court doth hereby certify and declare that this case, although coming within the provisions of the 14 & 15 Vict. c. 57 (1) (both parties being resident within the same jurisdiction) was nevertheless a fit and proper case to be tried in one of the superior Courts." That is the rule to which your Lordships' question refers; and, for the reason I have given, we think that that rule is conclusive, and that it is not in the power of either of the parties to bring an appeal from it, or to bring error upon it. For the reasons I have stated it is absolutely conclusive in the case.

It was said by the learned counsel that there was no jurisdiction to make this rule. That is entirely a mistake. The Court of Common Pleas is one of the superior Courts of Record. It may be that the Act of Parliament did not justify it, but nevertheless the Judges had perfect jurisdiction to make it; and the rule being made by them, it is binding and conclusive on all the world unless it can be altered by appeal or error. Our judgment is, that it cannot be altered in that way, and that no writ of error can be



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maintained. Our answer to your Lordships' question is therefore what I have already stated.

My Lords, there was a case that was very much relied on by the counsel for the Appellant, namely, *Banks v. Newton* (1). It seems to us not necessary to give an opinion as to whether that case be right or wrong. But possibly it might be said, that inasmuch as the fact, relied on there by the Plaintiff in asking for costs, might have then been brought before the Court by way of suggestion, it was too late afterwards to bring it before the Court by way of error. In fact, we cannot help observing that if there be any error at all in that case, the error is one in law, by giving a wrong decision with regard to an Act of Parliament; and it does not come within the line which was drawn in another case which has been referred to, where it was upon a question of fact.

For these reasons, which are entirely my own (but we all agree in the result), I am clearly of opinion that the answer which I have given to your Lordships is the correct one.

Now, a good deal has been said with respect to the effect of estoppel. It seems to me that that is entirely a mistake, for all these proceedings were not with regard to what the record was, but with regard to what the record should be, and the estoppel had never arisen at all.

Now, with respect to the second question which your Lordships have proposed, with regard to the discharge of this jury, there were, it appears, I think, two instances mentioned in the papers before your Lordships. At page 30 your Lordships will first find it, in the amended award of the arbitrators. After disposing of several issues, they state: "To the 8th, 9th, 10th, 11th, and 12th issues discharged from finding on them." Now, it was argued by the learned counsel that that meant that the jury discharged themselves from finding any verdict on those issues. But that is not the ordinary meaning of those words. They would rather appear to me to mean that some authority had discharged them from finding on those issues, not that they had discharged themselves. The inference that I should draw from it is, that if there were counsel before the arbitrators, and being so, they agreed that on these issues no question arose, there was no difficulty; but

(1) 4 D. & L. 632; 11 Q. B. 340.

whether they agreed or not is immaterial. Having the award upon the material matters discussed, they both agreed in saying to the arbitrators, "You need not trouble yourselves by inquiring into the other matters." I think that is what actually took place.

In page 32 it again occurs in this *postea* of the Judge. At the conclusion it states "that the jury are discharged from finding any verdict on the 8th, 9th, 10th, 11th, and 12th issues." That would seem as if the cause had actually been tried before the Judge, and the Judge had exercised the power, at the conclusion of the case, of discharging the jury. But nothing of the kind occurred. It was merely the formal mode of stating in the *postea* that as to those five counts the jury was discharged from finding any verdict. But whether that was so or not, we are all clearly of opinion that in the proceedings of a superior Court of Law everything is to be presumed in favour of the judgment of the Court, and we, until the act done is overruled, will assume that this discharge took place by proper authority.

For these reasons, my Lords, we are unanimously of opinion that we must answer your Lordships' questions thus: First, that the order of the Court of Common Pleas upon which the taxation of costs took place was not subject to review by proceeding in error; and, secondly, that there is not error apparent upon the record in the statement that the jurors were discharged from finding upon some of the issues.

LORD CHELMSFORD:—

My Lords, I submit to your Lordships that there is no necessity to call upon the counsel for the Defendant in Error, and that this case ought to be decided in accordance with the unanimous opinion of the learned Judges which has just been delivered.

The questions to be considered may be divided into the following:—First: Is there any error in law (apart from the suggested error in fact) appearing upon the record? Secondly: Is there any error in fact properly assigned upon the record?

As to the first question, whether there is any error in law appearing upon the record, the answer is simple, viz., that the Court had power to discharge the jury by consent; and it does not appear upon the record that the jury was discharged without

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consent, and that the Court had power to give costs upon a certificate or order, and it does not (apart from the error suggested in fact) appear upon the record that there was no certificate or order.

If a discharge of the jury upon an issue in fact appears upon the record, it is assumed, unless the contrary appears, that it took place by consent, or under circumstances in which such a discharge was proper.

If costs are given upon the record in a case in which the *Statute of Gloucester* gives costs, it is assumed that the Court has been satisfied that the conditions, imposed by subsequent statutes, restricting the Plaintiff's rights under the *Statute of Gloucester*, have been complied with. Thus, in cases falling within Lord *Denman's* Act the practice was not to suggest the certificate upon the record, but simply to produce such certificate to the Taxing Officer, who thereupon taxed the costs as if Lord *Denman's* Act had not passed; or, if he erroneously allowed costs without the production of such certificate, to apply to the Court upon motion to set aside the taxation. None of these proceedings would appear upon the record.

The rule as to error in law is to assume that the Court has acted within its jurisdiction, unless the record shews the contrary. "The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so:" *Peacock v. Bell* (1).

Upon this principle the Court of Exchequer Chamber acted in *Powell v. Sonett* (2), where the jury was discharged without consent appearing upon the record. The House of Lords affirmed that judgment (3), upon the ground that the issues were immaterial, and that the Judge might discharge the jury without consent, but said nothing to affect the ground of the decision of the Court of Exchequer Chamber applying to proceedings of a superior Court the presumption *omnia rite esse acta*, which appears to be sound.

As to the second question, whether there is any error in fact properly assigned upon the record, that depends upon three con-

(1) 1 Wms. Saund. 69, 74 b.

(2) 3 Bing. 381.

(3) 1 Dow. & Cl. 56; 1 Bli. (N. S.)

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siderations:—First: Whether (assuming that the statute does not mean that the question of costs shall be decided upon motion, and not upon the record) the case of *Banks v. Newton* (1) was rightly decided; and if so, secondly, whether, upon the true construction of the 97th section of the 19 & 20 Vict. c. 102, there was a “trial” at which the judge ought to have certified. There is, however, a third independent and overruling consideration, namely, whether this 97th section does not make an end of the matter by rendering a suggestion upon the record unnecessary, and so directing that the question shall be decided upon motion, which is collateral to the record, upon which no error could be assigned.

As to *Banks v. Newton* (1), my opinion is that it cannot be sustained. The fact that the Defendant could, before judgment, have suggested that which he afterwards alleged as constituting matter of error ought to have precluded him from being heard after the judgment. The case stands alone, and the suggested analogies are misleading. Thus error in fact by the husband of a *feme covert* who has appeared without him upon the record is brought by a stranger to the record. Error in fact by an infant who has appeared by attorney is suggested by a person under disability. There are other cases in which facts may be suggested as error, but these are facts which could not have been put upon the record by plea, challenge, or formal suggestions during the proceedings.

This is a case in which a party, fully competent, had a formal mode of raising the question by way of suggestion before judgment, and has passed by that occasion. He ought, therefore, not to bring error in fact any more than he could do so to raise a matter of abatement or bar which he has not pleaded, or of challenge not formally assigned—a course clearly inadmissible. This was not considered in *Banks v. Newton* (1), and the reasons for the judgment are not given. The case was very summarily disposed of, and undoubtedly the judgment which was given, that the previous judgment should be reversed, was itself incorrect, because the judgment should have been revoked or recalled.

As to the question whether there was a “trial,” it should seem that if the Defendant can go off the record, so may the Plaintiff, to prove that there was not, within the meaning of the statute, any

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(1) 11 Q. B. 340.



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trial before a Judge who could certify properly, the parties having agreed upon a different mode of decision, with the technical effect of an ordinary trial as to the verdict. There was no "trial" in the popular sense. The case was referred, and was not tried.

The third consideration, however, seems to govern the case. Ordinarily, without an enactment that no suggestion shall be necessary, a suggestion would be necessary to raise the question. The statute, in effect, says that no suggestion shall be necessary for the Defendant, which involves a direction that the relief shall be given by motion. The result is, that the control over the question of costs is given to the Court upon motion; and if this is so, no error lies, even though the proceedings upon the motion should appear upon the record, and even appear to have terminated against law. That seems to be decided by *Mellish v. Richardson* (1), and *Ricketts v. Noble* (2).

With respect to the case of *Ricketts v. Noble* (2), upon which the counsel for the Plaintiff in Error strongly relied, I must observe that, looking at the case as originally brought before the Court (3), it would be an authority in favour of the Plaintiff in Error. That was a case in which an application was made to the Court under the statute of the 43 Geo. 3, by which, where a Defendant had been arrested and held to bail, and the Plaintiff recovered less than the sum for which he had arrested the Defendant, the Defendant was entitled to costs upon an application to the Court by a motion for a rule to that effect. In that case the arrest had taken place under the 1 & 2 Vict. c. 110, and it was held by the Court that an arrest under a *capias* by the statute of 43 Geo. 3, c. 46, did not apply to a case of that description under the 1 & 2 Vict. c. 110; and the Court therefore discharged the rule (4), but said: "As the question has never been actually decided, we shall, if the Defendant intimates that he wishes that course to be taken, direct a suggestion to be entered on the record which will enable the parties to raise the question in a writ of error." That, undoubtedly, is a very clear decision in favour of the Plaintiff in Error; but then, after the rule was disposed of in that way, an application was made to the Court to amend the rule by striking out that part of

(1) 1 Cl. & F. 224.

(2) 3 Ex. 521; 4 Ex. 260.

(3) 3 Ex. 521.

(4) Ibid. 526.

it which allowed the party to enter the suggestion, and by leaving it merely "Rule discharged;" and the Court amended the rule accordingly, upon the ground that the entry of the suggestion was improper (1). One of the grounds upon which it was argued that it was improper was, that it was a case in which no suggestion could be entered under the 43 Geo. 3, the matter being to be decided by the Court upon a rule.

Under these circumstances, upon this latter question, which seems to me the most important one, whether error will lie upon this Order by which the Plaintiff obtained his taxation of costs, being clearly of opinion that it is not competent to assign error upon a proceeding of that kind, I submit to your Lordships that the judgment of the Court of Exchequer Chamber is right, and should be affirmed.

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LORD WESTBURY:—

My Lords, we are all exceedingly glad when in a collection of miserable technicalities such as these which are before us here, we can see our way to something like a solid and reasonable ground of decision, and, above all, a decision which will prevent future litigation between the parties. I rejoice, therefore, in having heard the opinions of the learned Judges, for undoubtedly they have put the matter in a most reasonable way, and one which I hope will prevent future litigation.

Now, apart from technicality, the question ought not to admit of any doubt. We are dealing here with an assignment of error on the record. The error is alleged to consist in this, that there was no certificate given by the Judge. Now, if we confined our attention to the record itself I should have thought that the reasonable conclusion of law would be, that as the costs have been taxed, and the proceedings were apparently due and regular, the assumption ought to have been made that there had been such a certificate. But if we depart from the record and look at the real state of the circumstances, it is quite clear that in the Court, by reason of there being no trial, but only a reference to arbitration, there was no opportunity given to the presiding Judge to give a

(1) 4 Ex. 260.

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certificate. In that state of things what is it that the Legislature by this enactment plainly intended should be done? It left to the Court the power of supplying the Judge's certificate by rule or order. That has been done by the Court by the order of the 30th of May, 1862. Now there could be no dispute upon a certificate of the Judge given at the "trial." Is it reasonable, then, that that order made on the 30th of May, 1862, should be disputed so as to make it at all cognizable upon a writ of error? I apprehend that would be a most inconvenient and most unreasonable thing. I take it, therefore, that the order made by the Court supplied, and finally and conclusively supplied, the want of the Judge's certificate. Now, the assignment of error proceeds wholly on this, that, in fact, there was no certificate on the part of the Judge. The Plaintiff in the proceeding in error brings forward the order that was made; therefore it appears to me that there certainly was no error in fact, because if I take the order, and take the complaint made by the assignment of error, the order is an answer to the assignment of error, and the right conclusion is, that there is no error in the proceedings.

My Lords, I hoped at first that we should be confined by technical rules to a narrow issue; but I see that the judgment of the Court of Exchequer Chamber in *Ireland* was given in general terms—that there was not any error in the proceedings. The whole question, therefore, was brought up by the proceeding in error. The objection that there was not a certificate is, in substance, answered and removed by the fact of there being that order which supplies the certificate. Then if it be intended to assert that the order was erroneous because it exceeded the jurisdiction of the Court, it cannot be said to be *ultrà vires* the jurisdiction of the Court, because the Court unquestionably had power to entertain the question that was raised before it; and the Court having decided that question by the order made in May, 1862, it follows upon every principle of convenience and expediency that the decision shall not be made the subject of any proceeding in error, and that the matter should be regarded as having been adequately and finally decided.

I trust, therefore, my Lords, that the conclusion your Lordships will arrive at will be, that there has been no error according

to the alleged assignment of error, that there was no need of a certificate to do that which had been done in conformity with the law, and that therefore this appeal ought to be dismissed with costs.

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LORD COLONSAY entirely concurred.

LORD CAIRNS :—

My Lords, it is impossible to look at this litigation, and the vast length of time it has lasted, upon the only subject which is brought in question, without feeling great pain. The question which your Lordships have been invited to consider is one which appears to me to be one of the purest technicality. It is admitted, and it must be admitted, that according to the true meaning of the statute, if a certificate has been given stating that it was a case proper to be tried before one of the superior Courts, and that certificate has been given by the Judge at the trial, if there was a trial, or has been given by the Court or any Judge of the Court if there was no trial, the Defendant has no just ground to complain. It appears to me that it is clear that it was the intention of the statute that the propriety of such certificate should not be made a subject of appeal. And it appears to me also that inasmuch as the Court of Common Pleas could give the certificate which it did give, that Court must have had power to adjudicate upon the question, whether there was a trial or not. It was within the competency of the Court to decide that question, and that decision is not a matter to be brought under review by appeal.

Looking at the matter in that point of view, it appears to me that when we are asked to consider the question whether there is error upon this record, I must answer it in this way. Is there anything on this record, as we now find it, raising a question which can properly be brought under review by way of error? And, addressing myself to that question, I concur entirely in the opinion which has been pronounced by the learned Judges, that there is no error upon the record which can properly be raised as matter of error. In other words, that the decision of the Court of Common Pleas, on motion, was fully within the competency of that Court, and, as such, could not be made ground of error, and



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cannot be brought under review by bringing it upon the record, and thus endeavouring to do indirectly what could not be done directly.

*Judgment of the Court of Exchequer Chamber  
in Ireland affirmed, with costs.*

*Lords' Journals, 27th June, 1871.*

Attorneys for the Plaintiff in Error: *Edward Corcoran, Dublin;  
Holmes, Anton, Grey, & White, London.*

Attorneys for the Defendant in Error: *T. Turpin, Dublin;  
Bryde & Robinson, London.*

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April 25, 27;  
June 8.

MARY GORDON . . . . . APPELLANT;  
ROBERT FRANCIS GORDON AND OTHERS . RESPONDENTS;

AND

SIR LIONEL SMITH GORDON . . . . . APPELLANT;  
ROBERT FRANCIS GORDON AND OTHERS . RESPONDENTS.

*Will—Construction.*

20620417 In construing a will, if the words used are themselves of doubtful meaning, the circumstances of the case may be referred to for the purpose of assisting in the explanation, but must not be employed to show the construction to be doubtful, in order to enable the Court to make what appears a more reasonable will for the testator.

The rule of construction stated by Lord *Cranworth* in *Abbott v. Middleton* (1) adopted.

The recurring use of the words "As to" at the commencement of several devises is not necessarily an indication of the commencement of a devise complete in itself, and separate and independent from other limitations.

A testator at the date of his will had two sons and one daughter. The elder son was married, but had no children. On the marriage of this son in 1825 the larger portion of one of the testator's estates (called the *Florida* estate) had been made the subject of settlement. By this settlement the son was (after his father's death), to have a life estate, remainder to his sons *by his then intended wife* in tail male. In 1836 the testator made a will, which recited this settlement, erroneously describing it as limiting estates in tail male to *all the sons* of this son. He created certain annuities, and charged them, and also his debts and legacies, on all his estates devised to his two

(1) 7 H. L. C. 89. *5 June 1857*

sons, in the proportion of two thirds and one third (those being the proportions in which he had devised the estates themselves). He then vested in a trustee the whole of his real estates, by specific description, including his reversion in the settled property. He limited a term of 200 years in all his estates excepting this reversion to secure annuities, debts, and legacies. He then, as to one estate and certain portions of another, limited the uses to his elder son and the sons of that son in tail male and tail general, with remainder to the second son and his sons in tail male and tail general, remainder to the daughters of the two sons successively in tail male. He made similar dispositions as to the smaller portion of his estates in favour of his second son and his sons, giving the remainders to the sons of the elder son, as he had before given them, with respect to the first devised estates, to the sons of the younger son, and then to the daughters of both, as before. He continued: "In default of such issue, male and female, of all the sons and daughters of my sons, then in trust and to the use of my daughter," and concluded with a residuary clause in favour of the sons equally:—

*Held*, that this devise over was ambiguous, and might refer to both the estates, or only to one of them, and that, under such circumstances, that construction was to be put upon the will which would best effectuate what appeared to be the reasonable purpose of the testator, and that the devise over must be held to affect both sets of the estates, and not one alone.

THIS was an appeal against a decree of the Vice-Chancellor of *Ireland*. The question raised in the case related to the construction of the will of *David Gordon*, late of *Florida Manor*, in the county of *Down*. Mr. *David Gordon*, the testator, was for many years in practice as a solicitor in *Dublin*. He was a younger brother, but succeeded, on the death of his elder brother, to the possession of the family estate, called *Florida Manor*. In the course of years he purchased other estates.

In 1825, on the marriage of his elder son, *Robert*, with *Mary Crawford*, a settlement was executed by which a part of the *Florida Manor* estate, consisting of the lands of *Ballybunden*, *Killmood* (and the right of alternate presentation to its church, &c.), and *Drumreagh*, and the lands of *Ballykeigle*—of all which the testator was seised in fee simple—were conveyed to the following and other uses:—*Mary*, the wife of *Robert Gordon*, was, after her husband's decease, to receive a jointure annuity of £500 for life, and a term of years was created to secure the same; and, subject thereto, the settled lands were to be to the use of *David Gordon* for life, remainder to *Robert Gordon* for life, with remainders (subject to a trust for younger children's portions) to the first and other sons of *Robert* by the said *Mary Crawford*, in tail male,

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remainder to *David Gordon's* right heirs. The rental of these lands was about £2400 a year.

There were other lands, usually treated as part of the *Florida Manor* estate, and known as the lands of *Ballymacashen* and *Ballow*, of the yearly value of about £176, which were not included in the settlement.

At the time of making his will in 1836, and of his death in 1837, *David Gordon* was seised in fee of three other estates, known as the *Dundonald* estate (rental £1440), comprising the lands of *Ballybeen*, *Carrowreagh*, and *Church Quarter*; the *Delamont* estate (rental £1470), comprising the lands of *Delamont*, *Tullychin*, and *Drumalig*; and the *Longfield* estate (rental £987), comprising lands in *Upper* and *Lower Longfield*.

The will, dated the 22nd of February, 1836, recited the settlement of 1825, and stated that "the manor of *Florida*, the town and lands of *Ballybunden*, *Killmood*, and *Ballykeigle*, with the rectorial titles thereof, the alternate advowsons of the church of *Killmood*, and the town and lands of *Drumreagh*, &c., have been conveyed and settled, &c.," to certain uses therein set forth, "and after my death the same are settled on my son *Robert* for life, with remainder to his first and other sons in tail male, with remainder, subject, &c., to my own right heirs in fee." The will first charged debts and legacies on personal estate, and then charged them, and the life annuities granted by the will itself, "on the lands devised to my sons *Robert* and *James*," in fixed proportions—two-thirds on those of *Robert*, and one-third on those of *James*. After certain legacies and life annuities, he devised unto his nephew *James Crawford* the lands in *Ballymacashen* and *Ballow*, and the town lands of *Drumalig*, *Ballybeen*, and *Carrowreagh*, with their rectorial tithes, the lands in *Church Quarter*, *Delamont*, and *Tullychin*, and all his property in the two parishes of *Longfield*, and "my estate and reversion in the manor, lands, and premises comprised in the settlement" of 1825: to hold in trust *As to* the lands of *Ballymacashen*, *Ballow*, *Ballybeen*, *Carrowreagh*, and *Church Quarter*, and all his lands in the county of *Tyrone*, and *Delamont*, *Tullychin*, and *Drumalig*, to the use of trustees therein named for a term of 200 years; and, subject to the said term and the trusts thereof, *As to* the farms in *Ballymacashen*, the lands of *Ballow*, the lands of

*Ballybeen, Carrowreagh, and Church Quarter, and also as to one equal half of all his lands and premises in the county of Tyrone, In trust out of the rents to pay an annuity (£666 13s. 4d.) to the testator's wife for life; and, subject as before mentioned, to the use of his son Robert Gordon for life; and after the decease of Robert to the use of his first and other sons in tail male; and in default of such issue to the first and every son of Robert in tail general; and in default of such issue to the testator's son James Gordon for life, and to his first and other sons successively in tail male; in default to the first and every son of James successively in tail general; and in default of such issue male to the first and every other daughter of Robert in tail male; and in default of such issue female of his son Robert to the first and every other daughter of his son James successively in tail male. And as to the lands of Delamont and Tullychin and Drumalig, and the other undivided moiety of the lands in the county of Tyrone, subject to the said term of 200 years and the trusts thereof, in trust to pay to the testator's wife an annuity of £333 6s. 8d. for life; and, subject as aforesaid, to the use of James for life, and after his decease to the use of his first and other sons successively in tail male; and in default to the use of the first and every other son of James successively in tail general; and in default to the use of Robert for life; and after his decease to the use of the first and every other son of Robert successively in tail male; and for default to the first and every other son of Robert successively in tail general; and in default of such issue male of Robert, then to the use of the first and every other daughter of James successively in tail male; and in default of such issue female of his son James, to the use of the first and every other daughter of his son Robert successively in tail male; and in default of such issue male and female of all the sons and daughters of his sons Robert and James, to the use of his daughter Jane Maria for life, and after her decease, to the use of her first and other sons successively in tail male; and in default of such issue to the use of her first and other daughters successively in tail male; and in default of such issue to the use of his brother Robert Gordon for life; and after his decease to the use of his nephew Robert Francis Gordon for life, then to his sons successively in tail male; and in default of such issue to his nephew Alexander*

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*Gordon* (another nephew) for life, and to his first and other sons successively in tail male; with various other successions of a similar kind.

The reversion was disposed of in the following terms, which were relied on as expressing the testator's intentions with respect to the limitations contained in the previous part of the will:—  
 “And as to my estate and reversion of and in the manor of *Florida*, and the other lands and premises mentioned in the marriage settlement of my said son *Robert*, I do hereby declare that I have devised the same to the said *James Crawford* [to and upon the several uses and trusts hereinbefore limited and declared of and concerning my said farms of *Ballymacashen* and *Ballow*, and the town and lands of *Ballybeen* and *Carroureagh*,\* and my lands in *Church Quarter*, and undivided moiety of my lands in the county of *Tyrone*; in default of issue of the sons of my said son *Robert*, and all the subsequent uses and limitations thereafter limited and declared concerning the same, as fully as if the same were herein again repeated and declared.”

The testator gave leasing and jointuring powers on these terms:—“I give to my sons *Robert* and *James*, and to each person who shall from time to time be seised for an estate for life in possession of and in the premises before respectively limited to them, full power and authority to execute leases or demises of any part or parts of the lands of which they shall respectively be in possession for any term not exceeding one life or thirty-one years concurrent, so as any such lease may be in possession, &c. . . . And to my son *James* and to my nephews, in case of his or their respective remainders for life becoming vested in possession of my said estates, I give the power of charging said lands with a jointure for his or any of their wives, not exceeding £500 yearly, and provision for younger children's portions not exceeding £8000, all with this restriction, to wit: if there be a widow of a preceding tenant for life living, and entitled to a jointure, then no sum to be charged as a farther jointure shall, during the continuance of such prior jointure, exceed half the sum for that purpose before mentioned; and if there be a younger child or younger children of any deceased tenant for life entitled to such pecuniary provision, then no sum or sums shall be charged for younger children of any

succeeding tenant or tenants for life which shall exceed altogether half the sum for that purpose before mentioned."

There was then a general residuary clause in these terms: "As to all the rest, residue, and remainder of my estate, real and personal, subject to my debts, legacies, and annuities, I give, &c., the same unto and amongst my said sons, *Robert* and *James*, their heirs, executors, &c., to be equally divided between them."

The testator died on the 2nd of March, 1837, and his will was proved by his son *Robert* on the 11th of May following.

*Robert* and *James* entered into possession of the estates respectively devised to them, and *Robert* died on the 7th of March, 1864. By his will he appointed his wife, *Mary*, executrix of his will, and gave to her all his property not previously disposed of in specific legacies. In 1842, *James Gordon* married *Geraldine Penrose*, and on his marriage charged for her benefit a sum of £500 a-year, payable out of the *Delamont* estate and the undivided moiety of the *Longfield* estate. He died in November, 1867, and after bequeathing several legacies, and directing the annual sum of £500 to be raised out of his father's estates, and paid to his widow for life, bequeathed the residue of his property to his cousin, Sir *Lionel Smith Gordon*, his heirs, &c. Both sons died without issue.

*Jane Maria*, the daughter of *David Gordon*, died in 1866, without ever having been married. The testator's brother, *Robert Gordon*, had died in 1858.

Upon the death of *James Gordon* the following persons claimed to be entitled to estates under the will of *David Gordon*:—

*Robert Francis Gordon* (the nephew) claimed as tenant for life the lands of *Delamont*, *Tullychin*, and *Drumalig*, and a moiety of the lands of *Longfield*. So far his claim was not disputed.

Sir *L. Smith Gordon*, as residuary devisee of *James Gordon*, claimed one undivided moiety of the farm of *Ballymacashen*, the lands of *Bal-low*, and those lands known as the *Dundonald* estate, and a moiety of the lands of *Longfield*, and a moiety of the lands comprised in the settlement of 1825, and known as the *Florida Manor* estate.

*Mary Gordon*, as residuary devisee of her husband *Robert*, the testator's son, claimed to be entitled to the other undivided moiety of the lands enumerated in the claim of Sir *Lionel Smith Gordon*, and to the jointure of £500 charged on all the lands.

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*Robert Francis Gordon* contended, in opposition to both these latter claimants, that he was entitled to the said several lands and premises, and that the same were bound by the limitations in the will under which he derived his title to the *Delamont* estate and the moiety of the *Longfield* estate. He accordingly filed his bill in the Court of Chancery in *Ireland*, praying, first, that the trusts of the will of *David Gordon* might be carried into effect; secondly, that it might be declared that, in the events which had happened, he was entitled to an estate for life in possession in all the real estates devised by the will, subject to the jointure annuities; and that the liability of the estate to the jointure annuity of *Geraldine*, the widow of *James Gordon*, might be ascertained and declared; thirdly, that he might be put in possession of the mansion-house, &c., of *Florida Manor*, and that *Sir Lionel Smith Gordon* (who had entered on possession of it) might be ordered to pay him an occupation rent for the same; and for accounts, &c., and for general relief.

In March, 1868, *Sir Lionel Smith Gordon* put in his answer, and submitted that upon the deaths, without issue, of *Robert* and *James*, the sons of *David Gordon*, the *Florida* estate, and the alternate right of presentation to the church of *Killmood*, and the lands of *Ballykeigle*, all of which were comprised in the settlement of 1825; and also the lands of *Ballymacashen* and *Ballow*, and the *Dun-donald* estate, and the moiety of the *Longfield* estate, passed under the residuary devise in the will of *David Gordon* to his sons *Robert* and *James* absolutely, in equal shares as tenants in common in fee; that he, as devisee of *James*, was entitled to an undivided moiety of the lands and premises respectively, and that the lands known as the *Delamont* estate, and the moiety of the *Longfield* estate, to which the Plaintiff was entitled, were subject to the jointure of £500 a-year charged thereon for the benefit of *Geraldine Gordon* by the settlement upon her marriage.

In April, 1868, *Mary Gordon* put in her answer to the Plaintiff's bill, and submitted that, so far as the whole estates and interests of *David Gordon* were undisposed of by his will, she was entitled thereto as devisee of her husband, *Robert Gordon*, the elder son and heir of *David Gordon*; that under the residuary devise in the will of *David Gordon*, and the will of *Robert Gordon*, she was

entitled in fee simple to one undivided moiety of the *Florida Manor* estates and the other estates comprised in the settlement of 1825, subject to the term created by that settlement and the subsisting trusts thereof; and that she was also in like manner entitled in fee simple to an undivided moiety in the two farms of *Ballymacashen*, to the mill of *Ballow*, the lands of *Ballybeen*, *Carrowreagh*, and *Church Quarter*, and to the moiety of the *Longfield* estate. She farther submitted, that she was entitled to the jointure of £500 per annum secured by the term in the settlement and charged on the lands comprised therein; and that the jointure of £500 a-year payable to *Geraldine Gordon* under the settlement of September, 1842, was charged exclusively on the estates comprised in that settlement, and known as the *Delamont* estate, and the moiety of the *Longfield* estate, and was not charged on any of the estates to which she, *Mary Gordon*, was entitled.

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The other Defendants likewise put in answers to the Plaintiff's bill, but it is unnecessary to give their details.

The cause was heard before the Vice-Chancellor of *Ireland*, who, on the 8th of June, 1868, made a decree, declaring that, upon the true construction of the will of *David Gordon*, the Plaintiff, *Robert Francis Gordon*, became, upon the death of *James Gordon*, entitled to an estate for life in possession, with remainders over, as in the will limited, in all the real estates by the will specifically devised, subject to the subsisting trusts declared by the settlement of 1825, in the lands and hereditaments therein comprised; that *Geraldine Gordon* was entitled, under the power contained in the will, and the appointment in exercise thereof made by the will of *James Gordon*, to a jointure annuity for life of £500 a-year, issuing out of and charged upon all the aforesaid real estates. And the Court made no declaration as to the rights of *Geraldine Gordon* under the settlement of 1842, it being unnecessary so to do.

*Mary Gordon* and Sir *Lionel Smith Gordon* appealed against this decree.

Sir *R. Palmer*, Q.C., Mr. *C. Andrews*, Q.C., Mr. *A. S. Jackson*, Q.C., and Mr. *Ferrers* (the last three gentlemen of the Irish Bar) were of counsel for *Mary Gordon*.

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Mr. *J. Pearson*, Q.C., Mr. *C. R. Freeling*, and Mr. *P. Ingham*, appeared for Sir *Lionel Smith Gordon*.

The counsel heard for the Appellants were Sir *R. Palmer* and Mr. *Pearson*.

Mr. *Jessel*, Q.C., Mr. *G. A. C. May*, Q.C. (of the Irish Bar), Mr. *Charles Hall*, Mr. *W. D. Andrews* (of the Irish Bar), and Mr. *Robbins*, appeared for the Respondents.

The cases of *Gray v. Golding* (1); *Earl of Newburgh v. Dowager Countess Newburgh* (2); *Hayes' Conveyancing* (3), and *Scarisbrick v. Eccleston* (4), were referred to.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, in these two appeals, which are both dependent upon the construction of a will, I propose to enter at some length into the reasons for which I have come to the conclusion at which I have arrived, because it appears not to be in harmony with those which have been arrived at by the rest of your Lordships.

The important question raised upon this appeal is, whether the reversions of the *Florida Manor* estate, and the *Dundonald* estates, and one half of *Longfield*, were devised by the testator's will, after the death of his sons *Robert* and *James* respectively without having had any child, upon the long series of limitations which undoubtedly in that event are declared of the *Delamont* estate, and of the other half of *Longfield*; or whether the *Dundonald* estate and one half of *Longfield* were, on such failure of issue of *Robert* and *James*, undisposed of save by the residuary clause by which the residue of the testator's real estate was given in equal moieties to *Robert* and *James* in fee.

The gift of the reversion of the *Florida* estate is made by reference to the limitations of the *Dundonald* estates, but commencing from and after the limitation in default of issue of *Robert*; and it would thus subject the *Florida Manor* estate to the like course of

(1) 2 L. T. (N.S.) 198.

Law of Prop. pp. 196, 206.

(2) 5 Madd. 364; 8 Bing. 254;

(3) 4th Edit. p. 464, and n.

Printed Cases, D. P. 1825; Sugden's

(4) 5 Cl. & F. 398.

devolution down to and, according to the Respondent's contention, including the ultimate devise to *Maxwell Hamilton* in fee.

The Vice-Chancellor of *Ireland* has held that this construction is the true construction of the testator's will; and from that decision the widow and devisee of *Robert Gordon* and Sir *Lionel Smith Gordon*, as devisee of *James Gordon*, have appealed.

Now if we regard simply the language of the testator's will, which, though very carelessly prepared in many respects, is still couched in precise technical phraseology, there appears to me to be no ambiguity whatever in the construction. The testator refers to his interest in the settled lands, and then charges his debts, legacies, and annuities in the proportion of two-thirds on the lands afterwards devised to his son *Robert*, and one-third on those devised to his son *James*. He then devises his estates purchased after the date of the settlement, which have been distinguished in the argument under a threefold designation (viz., the *Dundonald*, the *Delamont*, and the *Longfield* estates), and also his reversion in the settled estates, to a devisee to uses (his nephew *James Crawford*). Here there are four distinct subjects, the *Dundonald*, the *Delamont*, and the *Longfield* estates, and the reversion of the settled estates. He then makes his dispositions, and declares the uses of the property thus devised to *James Crawford*, taking up the several subjects of gift in order by the words "as to." I will designate each subject by the short name attributed to it in argument. As to *Dundonald*, *Delamont*, and *Longfield*, he gives them to the use of trustees for a term of 200 years on trusts afterwards declared. And subject to that term "as to" *Dundonald*, and one half of *Longfield*, he declares certain trusts in this order:—To the use of *Robert* for life, remainder to the use of his first and other sons in tail male, remainder to the use of his first and other sons in tail general; and in default of such issue to similar uses in favour of *James* and his sons, first in tail male, then in tail general. And then he says (apparently by mistake) in default of such "issue male" (having limited the last previous estate in tail general) to the use of the first and every other daughter of *Robert* in tail male, and in default of such issue female of *Robert* to the use of the first and every other daughter of *James* in tail male. He then makes a full stop, and takes up other subjects of his

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devise to *James Crawford*, viz., the *Delamont* estate and the other moiety of *Longfield*, by these words of reference, "and as to the said lands of *Delamont*, &c.," and he declares a set of uses of those estates exactly in the same form as that in which he had declared them of the *Dundonald* estate, and the first moiety of *Longfield*, in favour of *Robert* and *James* and their issue, except that the order of the two sons and their issue is inverted; the uses commencing with *James* instead of *Robert*, and ending with the limitation to the daughters of *Robert* in tail male, after a limitation to his sons in tail general, with a similar inaccuracy to that in the former limitations, viz., making the limitations to the daughters of *Robert* to be in default of issue male of *Robert*, though the last preceding estate was to the sons of *Robert* in tail general. The will does not proceed to name any fresh *subject*, but follows up the limitation to the daughters of *Robert* in tail male, with the following words, "and in default of such issue male and female of all the sons and daughters of my said sons, *Robert* and *James*, then in trust for and to the use and behoof of my daughter *Jane Maria*, during her natural life," with numerous limitations over.

The testator, after this long set of limitations, proceeds to take up the fourth subject of his will, viz., the reversion of the settled estates in his usual form of "As to my estate and reversion," &c., and declares that he has given that estate to *James Crawford* to the several uses declared of the *Dundonald* estates in default of issue of the sons of *Robert*, "and all the subsequent uses and limitations thereafter limited and declared concerning the same, as fully as if the same were there repeated."

Now upon a will thus constructed, and so regularly introducing each subject matter of devise by the words, "As to such and such lands," and then proceeding regularly to limit the uses applicable to that subject matter, I confess it appears to me to be wholly unwarrantable to carry back the limitations beyond the last preceding words descriptive of the subject matter; or, in other words, to apply a set of limitations immediately following the words, "As to my estate *B*," to another subject matter, *A*, as to which a totally distinct set of limitations has been previously applied, separated from those applied to *B*. by the introduction of *B*. as their new subject. There appears to me to be nothing, either in the extrinsic

circumstances or in the other parts of the will, to justify such a forced grammatical construction. The limitations of the *Delamont* estates are perfect and sufficient in themselves, with the exception of the mistake as to a limitation in default of issue male of *Robert*; for, as I observe, the last preceding estate limited to him was in tail general; and again, the limitations flow on properly after the extinction of all the issue, male and female, of all the sons and daughters of *Robert* and *James*, though the expression is confused, until they end in *Maxwell Hamilton*, without the slightest reference to a new subject. I say the expression is confused; for there was no limitation to issue female of the daughters of *Robert* or *James*, but it was otherwise a summary of the previous limitations of the *Delamont* estate, and would be neither more nor less correct if the *Dundonald* estate were out of the will altogether. The limitation to *Jane Maria* thus starts with an incorrect gathering up of the previous limitations of the *Delamont* estate; but the introduction of the *Dundonald* estate and its limitations would not afford any aid in correcting that blunder and the two previous blunders in the limitations of both the *Dundonald* and *Delamont* estates, when, after an estate in tail general to the sons, a limitation to the daughters, introduced by the words in default of issue *male* only of the sons, shews the inaccuracy of the frame of the instrument. If, indeed, the limitation over to *Jane Maria* had been introduced by words of reference to a particular class of issue, to none of whom *Delamont* had been limited, but who could be found in the limitations of *Dundonald*, some excuse might be found for forcing the language used; but such is not the case.

Neither, again, in the limitations of the reversion, introduced like all the other subject matters by the words, "As to my reversion," is there anything which can justify an extension of the limitations of *Delamont* to the *Dundonald* estates? The testator declares that the uses are to be the same as those declared of the *Dundonald* estates in default of issue of the sons of *Robert*, and all the subsequent uses and limitations thereafter limited and declared concerning the same. Now the immediate uses limited of *Dundonald*, after the default of issue of the sons of *Robert*, are to *James* for life, with remainder to his sons, first in tail male, and afterwards in tail general; and then there are subsequent limita-

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tions to the first and other daughters of *Robert* in tail male, and then to the first and other daughters of *James* in tail male. The testator might therefore well mean to say, I do not exclude all the descendants of *Robert*, but I desire to carry the reversion to *James* and his sons, which are the first limitations in *Dundonald* immediately after the failure of issue of the sons of *Robert*. And he apparently adds the words, "all the subsequent uses and limitations" to let in the limitations to the daughters of each of the sons. It is true the words are superfluous, but so they are on the other supposition as to *Dundonald* being carried over to the *Delamont* uses; for if by tacking the subject matter of *Dundonald* to the testator's declaration of uses as to the subject matter of *Delamont*, you can carry *Dundonald* throughout that set of limitations, there is no need of repeating the operation by adding any words in the clause which deals with the reversion, beyond a simple reference to the limitations of *Dundonald*.

The only other observations occurring on the simple question of the construction of the will are those which arise on the form of leasing and jointuring powers, and the power of charging portions. I can find nothing in the leasing power affecting the construction of the devise. The testator expressly confines the power to those in possession of the estates respectively limited to them, which does no more than give to the testator's sons and every other person in possession power to lease whatever estates he may take by the will. Reference is made to the lands of which they "may respectively be in possession," and not to the whole as being swept into the possession of any one person.

More was said on the powers reserved to *James* only, and not to *Robert*, "and to 'my nephew' in case of his or their respective remainders for life becoming invested in possession of my said estates" of jointuring a wife with £500 a year, and charging £8000 for younger children. It is agreed that "nephew" must be read "nephews;" and it was said to be contemplated by the testator that as long as *Robert* lived or had issue the power would not arise, because *James's* estate in *Delamont* was in possession, and therefore he had no remainder for life then to come into possession, but that his interest in the *Dundonald* estate would come into effect on failure of *Robert's* issue male; and that the like would

occur as to his interest in the reversion of the settled estate; and that thus he would be found coming into possession, at the same time, of all the estates of the testator; and that so it would happen in the event of any nephew taking after both *James* and *Robert* had died without issue. It was urged, also, that the charging of so large a sum as £8000 on the *Delamont* estates alone was excessive, and rendered it improbable that such a power would be created.

But in thus reasoning it is forgotten that the testator has given his [reversion in the settled property at once to *James* for life, subject only to the estates that by the settlement precede the testator's fee simple; but those estates are limited by the settlement to the first and other sons of *Robert* by his then wife; so that if he had married again and had sons the devise to *James* for life would have taken effect as to the settled property, although those sons might be living, and *James* thus might possess the *Florida Manor* estate before he possessed the *Dundonald* estate itself. Again, the limitation of the *Dundonald* estate is to the sons of *Robert* in tail general before it passes to *James*. Therefore, if any son of *Robert* had daughters *James* would not take *Dundonald*, but his life estate in reversion in *Florida* would be an estate in possession as soon as the sons of *Robert* and their issue male failed, even if the limitations of the settlement had been (as it is said the testator supposed they were) to *Robert* and his sons by any wife in tail male.

The power, therefore, of charging portions on *Delamont* and *Florida* would come into existence as to *Florida* and *Delamont*, whilst as long as any daughters of sons of *Robert* existed they, and not *James*, would hold *Dundonald*. It is not, then, an answer to these observations to say that the testator has by his recital of the settlement shewn that he forgot that *Robert's* sons by a second marriage would not take. For it does not follow that a short recital is a mis-recital, nor can we well argue on the testator's intention from our imperfect knowledge of his exact information on the subject, since, again, by the will itself *Robert's* sons, who do not (as by the testator's own recital of the settlement appears) take any estate in tail general in *Florida*, yet take estates in tail general in *Dundonald*; and the same difficulty arises as to

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the possible separation of the estates without any such theory of mistake being possible. The testator gave no power of jointuring or raising portions to *Robert*, because he conceived the power in his settlement to be sufficient; yet why he should not have extended them in his case to the estates taken under the will, or why he should not have allowed *James* at once to exercise some power of jointuring and raising portions over the *Delamont* estates, on which there appears to have been a substantial residence, it is difficult to explain.

As regards the amount of the charge (£8000), *Robert*, had he married again, might, in some events, have charged that sum on *Florida*, viz., £5000 for children of the first marriage, and £3000 for those of a second marriage; and the estate so charged (had all the children been daughters) might have come to *James*, or, had there been sons as well who had left daughters, might have come to *James* without *Dundonald*. What ground, then, can there be for holding that the estates are not to be charged with portions under the will unless all come into one hand?

After all, the principal arguments in favour of a forced construction have been deduced from the state of the family and of the property. It is said that the testator had two sons, both then childless; that a settlement of his chief estate, which was also inherited by him from his brother, had been made on the eldest son's marriage, and that settlement provided for the eldest son and his sons by that marriage, and contained jointuring and portioning powers for the younger children of that or a subsequent marriage; that the other estates were after-acquired estates, though one of them (*Delamont*) had a residence upon it; that it is not natural that he should wish to sever the family estates from one portion of the after-acquired estates; and that the scheme of the will was to carry all the estates together, giving at first to the elder son, in addition to the settled estates, an interest for himself and his sons in tail male, or failing that, in tail general; and in tail male to his daughters in about one-half of the acquired estates, with remainder to the second son in like manner, and the other half of the acquired estates to his second son first, and his sons in tail male, and in tail general, and the issue male of his daughters, with remainder to the eldest son in like manner, and then, on failure of issue of his

two sons and of issue male of their daughters, to gather up the two sets of acquired estates into one, and to pass them over, together with the *Florida* estates, as an entirety to the remote relations. This is thought to be more natural than leaving the sons as residuary devisees in moieties to make a disposition of the settled *Florida* estates and the *Dundonald* estates for themselves in the event of such failure of issue as above mentioned. Be it observed that no such gathering up would ever occur if *Robert* had any sons who should leave daughters, for his granddaughters would, as co-heiresses in tail, retain *Dundonald* as against *James*, and if *James* and his sons and their issue failed, would take *Delamont* too, whilst *Florida*, the original family estate, according to the Respondent's construction, would go over to remote collaterals.

Now, this theory of probable intention appears to me to be a very unsafe basis for the interpretation of a will in which, though many blunders are committed, yet a very regular form of gift is adopted in describing the subject matter to which each set of limitations is to be applied. In the first place, as to keeping the estates together, it has been shewn that the sons of *Robert* take an estate in tail general in *Dundonald* before any estate is given to *James*; and as to *Delamont*, the gifts are inverted, so that the estate might be split into several fragments among co-heiresses in tail in each case. In the next place, I am not satisfied that the testator preferred giving all his estates to his remote relations (including, as to the family estate of *Florida*, the case in which issue of *Robert* by an after-taken wife or a daughter of his sons might be living) to leaving the bulk of his estates to the disposition of his two sons in default of their having issue. His arrangements are, in many cases, somewhat capricious. He gives his brother *Robert* a life estate only, and none to his issue; he creates a very fanciful limitation in *Lady Isabella Smith* before the last limitation in fee. He makes a yet more fanciful limitation in cutting off the possible sons by a second marriage of his son *Robert*, or their issue, from any interest in the reversion of *Florida Manor*. He is capricious enough also to limit the estate to distant cousins in preference to the female children of his daughter *Jane Maria*, though he gives the estate to the female children of his grandsons by sons as co-heiresses in tail general.

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I cannot see any ground for our expecting *à priori* such preferences, nor why he should not be content to leave his own sons, if they think fit, to dispose of the two principal estates by will (as residuary devisees) in the event of their issue being exhausted, leaving the *Delamont* estate and the mansion on it to his other relatives.

The Vice-Chancellor relied on, and Mr. *May*, in his very able speech, much pressed, the change of form in the gift over of *Delamont* after the failure of the sons and their issue, as if the testator had gathered up the *Dundonald*, *Delamont*, and *Longfield* estates in one mass, and placed them under one term of years, and then had allotted half of them, viz., the *Dundonald* and half *Longfield* to the sons and their issue in one form (preferring *Robert*); and the other half, viz., *Delamont*, and the other half of *Longfield*, in another form (there preferring *James*), calling them estates devised to *Robert*, and estates devised to *James* in the beginning of his will; and then, as was said, the change of phraseology in the limitations over after the last limitations to the sons and their issue in the *Delamont* estate shewed that he was going back in his mind to the whole property comprised in the term of 200 years. The speculation is an ingenious speculation, but I do not think it can justify the forced construction of applying to one subject, fully exhausted as far as the sons and their issue are concerned, another set of limitations of a totally distinct subject, fully exhausted also as far as the sons and their issue are concerned; for the form of limitation is exactly applicable to the limitation of the last-mentioned subject, as far at least as it would be applicable to the other (for there is, as I have observed, want of accuracy as to the failure of issue female of daughters who have not been provided for in either set of limitations). Nothing calls for such a construction but the supposed probability of his dealing with all his estates in a mass; which I have already shewn will not be the case however we may manipulate the terms of the will, for the estates would have been divided had any one of the sons (sons of *James* and *Robert*) had a family of daughters. Nor is the phraseology of the gift over of the reversion in any way conducive to the forced construction given to the will by the Court below; for it is just as applicable to the other and natural construction as to that which I consider forced.

I am aware that if there be a doubtful construction of a will the circumstances of the case may be used to guide our choice; but we must not (as has been said in another class of cases with reference to the vesting of portions) first make the construction, which is clear in itself, doubtful in order to make what we think a more reasonable will for the testator. It is not enough that a will may admit a forced construction. Of course, if it would not, no circumstances could alter the words; but the first course of construction is to read the will in its natural grammatical sense, and then only, if that fail to produce a clear meaning, to look out for some other possible sense. Where a meaning is plain and clear, grammatically, no other should be sought for.

On the whole, therefore, I am of opinion that the testator intended that which he has (as it seems to me) expressed, and that the decree should be reversed, and a declaration made accordingly.

LORD CHELMSFORD:—

My Lords, I am unable to subscribe to the opinion of the Vice-Chancellor of *Ireland*, that the will in question “was prepared with considerable skill and accuracy.” It contains a mistaken description of the state of the title to the part of the property upon which the question arises, an inaccuracy in reference to the extent of the previous limitations in the clause introductory to the limitations, upon the application of which to the disputed property the whole case depends, and an ambiguity in one of the most important clauses, all of which contribute to enhance the difficulty of arriving at a satisfactory conclusion as to its proper construction.

Upon a will so drawn, the exact intention of the testator is hard to be ascertained, and it is not to be wondered at that different minds should put different interpretations upon the language he has used to express that intention.

I admit, of course, the canon of construction that you are in the first place to determine the natural and ordinary meaning of the words employed; and to this you must adhere unless other parts of the will, or the general scope and object of it, plainly manifest that the testator meant them in a different sense.

The question upon this will is, whether the limitations of the *Delamont* estate, introduced by the words “in default of such issue,

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male and female, of all the sons and daughters of my said sons *Robert* and *James*," are confined to that estate, or are applicable also to the estate of which the testator had the reversion under the marriage settlement of his son *Robert*. I see nothing in the grammatical construction of this clause which militates against the application of the subsequent limitations to all the estates of the testator. And this intention, it seems to me, may be collected from a consideration of the whole scope and design of the will.

The Appellant, in arguing that the subsequent limitations are confined to the *Delamont* estate, placed great reliance upon the words introductory to the devise of this estate, "*and as to the lands of Mullough, otherwise Delamont,*" &c., as an indication of the commencement of a devise separate and independent, and complete in itself, down to the ultimate limitation. Upon close consideration of the will, I am not much struck with this argument. The testator devises to his nephew, *James Crawford*, and his heirs all his estates, including the reversion in question, "upon the uses and trusts hereinafter mentioned and declared of and concerning the same."

It is natural to expect that such an introduction would be followed by a declaration of the trusts of every part of his estates. The will thereupon proceeds, as to the *Dundonald* estate, to declare the use to his son *Robert* for life, and to his first and other sons successively in tail male and in tail general; and for default of such issue, to the use of his son *James*, and to his first and other sons in tail male and in tail general; and in default of such issue, to the daughters of *Robert* successively and their heirs male; and in default of such issue female, to the daughters of *James* successively and their heirs male. Having thus declared the limitations "as to" the *Dundonald* estate, down to the sons and their heirs in tail, and daughters and their heirs male, of *Robert* and *James*, there is no pause, but the will proceeds to the declaration of uses with respect to the *Delamont* estate (prefacing it with words connecting it with what has gone before, "and as to the lands of *Mullough, otherwise Delamont*"), and limits that estate to uses similar to those declared as to the *Dundonald* estate, except that *James* and his sons and daughters are placed in the order of limitations before *Robert* and his sons and daughters respectively.

So far, it appears to me, there is nothing to indicate that the testator, in passing from the *Dundonald* estate to the *Delamont* estate, intended that the latter estate should alone be the subject of a complete set of limitations. The frame of the will rather leads to a contrary conclusion. The testator says: "I devise all my estates to a trustee upon the uses and trusts hereinafter mentioned and declared concerning the same;" that is to say, as to the *Dundonald* estate, upon certain limitations, and as to the *Delamont* estate upon similar limitations, in favour of *Robert* and *James* and their sons and daughters and their issue male; and then follow the words, "and in default of such issue, male and female, of all the sons and daughters of my said sons *Robert* and *James*."

Now, putting aside the inaccuracy of this introduction to the subsequent limitations (as if the testator thought that the estates had been previously limited to the issue female of his sons' daughters), what is there to confine it to the limitations of the *Delamont* estate? Will not the words "such issue male and female of *Robert*" apply grammatically as well to the sons and daughters of *Robert* under the limitations of the *Dundonald* estate as to his sons and daughters under the limitations of the *Delamont* estate? And if, without doing any violence to the language, they are capable of this full application to all that has been antecedently expressed, why should a more restricted meaning be forced upon them? Why should it be supposed that the testator, in executing his expressed intention of disposing of the whole of his property, should have intentionally and deliberately stopped short in the limitations of the principal estate, and left its farther destination to the residuary clause, while he elaborately drew out to their utmost extent the limitations of the less important part, the *Delamont* estate?

If there is any doubt as to the words in question being intended to draw both estates within the range of the subsequent limitations, we may derive assistance in ascertaining the testator's intention by looking to other parts of the will, and to its general scope and object, and also by reference to the state of the testator's family, which he must be supposed to have had in his contemplation at the time of making it. The will was made on the 22nd of February, 1836. At that time his eldest son, *Robert*, had been

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married eleven years, and had no child. *James*, his other son, was unmarried. It was, no doubt, possible that *Robert* might have children, and that *James* might marry, and that he also might have children; but the possibility of these events not happening could hardly fail to have been in the mind of the testator at the time he was thinking of the disposition of his property. When he was so carefully and anxiously providing, by a minute series of limitations, for an order of succession which comprehended his nephews and nieces, and ultimately a distant relation, it seems most unlikely that he should have meant all this elaborate provision against an intestacy to be confined to one part, and that not the most valuable part, of his estates, and have allowed the principal estate to fall into the residue, so that his sons might deal with it at their pleasure.

That the testator thought that he had fully devised the reversion of the estates in *Robert's* marriage settlement may be inferred from the clause which expressly refers to it, the terms of which have been claimed by both sides as favourable to their construction.

It may be assumed to have been the intention of the testator to deal with the reversion in some way or other, as he expressly included it in the devise to the trustee of all his estates upon trusts to be thereafter declared. This reversion is afterwards nowhere specifically mentioned (but only the estates in which it existed) until we come to the clause in question, where the testator explains how he considers he has dealt, and therefore how he intended to deal, with the reversion.

He says: "As to my estate and reversion, &c., I do hereby declare that I have devised the same to *James Crawford*" (the trustee) "upon the several uses and trusts *hereinbefore* limited and declared of and concerning my said farms of *Ballymacashen* and *Ballow*, and the towns and lands of *Ballybeen* and *Carroureagh*, and my lands in *Church Quarter*, and undivided moiety of my lands in the county of *Tyrone*, in default of issue of the sons of my said son *Robert*."

The reversion of the testator in the marriage settlement was after the male issue of his son *Robert* by that marriage. The testator mistakenly supposed that it was after the issue generally of the sons of his son. But his reversionary interest (whatever it

was) he declares that he has devised upon the several trusts, &c., as to the farms and lands mentioned. The limitations of these farms [and lands are clearly expressed, and are continued down to the daughters of *James* in tail male, and there they stop. According to the Appellant, they were not meant to be carried farther. But the testator not only says: "I have devised the reversion to the uses and trusts *hereinbefore* limited and declared of and concerning the before-mentioned farms and lands;" but he adds, "and to all the *subsequent* uses and limitations thereafter limited and declared concerning the same as fully as if the same were herein again repeated and declared." Now, where are we to look for the "subsequent uses and limitations" applicable to these farms and lands, if it is not to those that follow the devise of the *Delamont* estates? If the construction of the learned counsel for the Appellant is right, the reference to subsequent uses and limitations is without meaning. They would end the description of the uses and trusts declared with the limitations in express terms applicable to the farms and lands mentioned, leaving no opening for reference to the subsequent uses and limitations. It appears to me that there is nothing in the context or in the grammatical construction of the language of the will to prevent the clause introductory to the subsequent uses and limitations after the devise of the *Dundonald* and *Delamont* estates being applicable to both estates; and I should have been disposed to read it in that sense, without considering any other part of the will, or the state of the testator's family. But when I advert to these considerations I am more strongly impressed with this conviction; and when I add to these the clause as to the reversion, which is declaratory, and not dispositive, I cannot bring my mind to any other conclusion than that the testator intended to dispose of his reversion to the uses and upon the trusts which follow the devise of the *Delamont* estate, and that his intention is carried out by the words introductory to the declaration of these uses and trusts—"in default of such issue male and female of all the sons and daughters of my said sons *Robert* and *James*"—which are applicable to the limitations to the sons and daughters of *Robert* in the *Dundonald* estate, as well as to the similar limitations in the *Delamont* estate.

For these reasons I am compelled to come to a different con-

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clusion from that at which my noble and learned friend on the woolsack has arrived, and am of opinion that the decree of the Vice-Chancellor of *Ireland* ought to be affirmed.

LORD WESTBURY:—

My Lords, I shall trouble your Lordships with a very few observations; and I do so chiefly because at the hearing I certainly was disposed to entertain a different opinion from that which, on a more deliberate consideration of the case, I have been compelled to arrive at. My present impression, therefore, being contrary to the former one, has been the result, I think, of a more accurate view of the case. I might well abstain from saying anything, because my noble and learned friend who has preceded me has gone fully into the matter; and I have had the advantage, since I came into the House, of reading the learned and very full and satisfactory opinion which has been prepared by my noble and learned friend opposite (Lord Cairns), and which your Lordships will presently hear.

My Lords, it really appears to me that the case is not open to any very considerable difficulty. The basis of the argument on the part of the Appellant was this: that each disposition of the estates in the will became a separate disposition by virtue of the introductory clause of the sentence, “as to.” Those words are found at the commencement of each sentence. It was argued, therefore, that those introductory words made the several sentences which follow separate dispositions of the subject matter to which the introductory words referred. It was also relied upon, that there was a full stop between the prior disposition and the subsequent disposition.

My Lords, so far as punctuation is concerned, I believe there is no trace of any punctuation in the original will; but whether that be so or not, I entirely concur in the opinion expressed by Sir *William Grant*, in a case before him (1), that “it is from the words, and from the context, and not from the punctuation,” that the meaning of the testator is to be collected. But I entirely deny that those introductory words have the effect of disjoining the two devises. On the contrary, I find, from the nature of the dispo-

(1) *Sanford v. Ruikes*, 1 Mer. 646–651.

sition, an uniform purpose pervading the two devises of what have been called the *Dundonald* and the *Delamont* estates.

Now, I beg your Lordships to observe, that in the antecedent part of the will the legal fee simple in the whole of the estates is vested in the trustee and his heirs. The words are, that he is to hold the estate on trust for the uses and trusts hereinafter mentioned and declared of and concerning the same. We are warranted, therefore, in expecting that the uses subsequently declared will exhaust and be commensurate with the fee simple so given to the trustee. The testator, then, carries that purpose into effect by a division of the estates between his sons, *Robert* and *James*, in the first place; and he gives the estate of *Dundonald* to *Robert* and his issue at length, and then to *James* and his issue at length, and there the devise stops. He then takes up the *Delamont* estate, evidently for the purpose of bringing up *James*, the first devisee of that estate, and his issue, and *Robert* and his issue in remainder, to a parallel position with that in which he had placed, in the first instance, *Robert* and his issue with regard to the *Dundonald* estate. It was happily illustrated in the argument by this figure, that in reality the first object of the testator is to head two parallel lines, one with the *Dundonald* estate at the top, and the other with the *Delamont* estate at the top, and to run through the gifts of those estates to *Robert* and his issue, remainder to *James* and his issue, and, relatively to *James* and his issue, remainder to *Robert* and his issue, before he proceeded to dispose of the reversion of the residue of the two estates. The object is perfectly clear, because the disposition of the residue of the two estates would be to one and the same set of objects, and there would be no longer any division between them. It was most reasonable, therefore, in the construction of the will, that the ultimate disposition of the undisposed interests in each of those two estates should be made by one and the same set of words, following upon the limitations of the two sets of estates, and taking effect when those prior limitations were exhausted. And I think that is plainly indicated by the language employed by the testator.

It has been argued on behalf of the Appellant that the word "such," in the introductory words of the sentence, refers to the last antecedent; and consequently the Appellant would carry on

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the words to the subsequent portions of the disposition, as being one entire sentence confined to the *Delamont* estate. But that is not what would have been the form of the disposition if the intention ascribed to the testator by the Appellant had really been entertained by him. For your Lordships will observe that the words in question are “in default of such issue, male and female, of all the sons and daughters of my said sons, *Robert* and *James*.” Now those words do not relate back simply to the last antecedent, which would be to the use of the first and every other daughter of his son *Robert* successively. If the testator had intended it to be a simply continuous sentence, the words would have been, “and in default of such female issue,” or “in default of such daughters of my son *Robert* ;” but instead of that the words are a general description of all that had been previously limited in favour of the issue, male and female, and the draftsman concludes with these general words, “in default of such issue male and female of all the sons and daughters.” It is not carrying on one continuous line, but it is an abrupt break of that line, in order to introduce a general expression, which gathers together into the sentence all the limitations previously made in favour of all the sons and daughters of his sons *Robert* and *James*. That difference in the form of the expression indicates clearly a different purpose with regard to the subsequent gift.

Now I beg your Lordships to remember that in all these devises what is expressed is nothing in the world more than a declaration of the uses of the general devise of the legal estate to the trustee. These things are a direction to the trustee. Now what is the direction contained in these words? I will trouble your Lordships by reading them again: “In default of such issue male and female of all the sons and daughters of my sons, *Robert* and *James*, *then*.” Now the adverb “then” is an elliptical form of expression; what is implied by it? Why this is implied—The trustee is to hold the estate, and “then,” of course, refers to something which is to arise and be carried into effect upon the happening of the event previously mentioned; the event previously mentioned being the general failure of all the aforesaid—for “such” here is equivalent to “the aforesaid”—“all the aforesaid issue, male and female, of the sons and daughters of my two sons.” It is impossible, having

regard to the construction of the will, and the ordinary use of language, to cut down those general words into a mere expression of another step in the continuous line. It is impossible to deny to those words the expression of an intention to comprehend retrospectively all that had been previously declared in favour of sons and daughters, and to add to that, by the force of the elliptical expression contained in the adverb "then," a direction that the trustee shall hold all the estates given to him to the uses subsequently declared.

My Lords, if that is so, it is quite a mistake to say that in putting this construction upon these words we are, first of all, finding out the probable intention extrinsically of the will, and then applying that probable intention, to put a forced construction upon the words, or to cut down and restrict their strict grammatical meaning. On the contrary, we are adhering to the strict grammatical meaning of the words and the inferences arising from the order of the dispositions, and the inferences arising from these forcible comprehensive introductory words; and we are giving effect to these comprehensive introductory words, according to their true grammatical meaning. I quite agree with my noble and learned friend on the woolsack, that it is a very dangerous thing to seek an intention extrinsically, and then to apply that supposed intention, to control the words of the will: but I am quite sure that my noble and learned friend will agree in the expression which is found in very many cases, that wherever there is any difficulty on the words of the will you are, if possible, to make the construction correspond with a reasonable and probable, rather than an improbable intention. Now here the reasonableness of the intention is plain, and what would naturally have occurred to the draftsman is plain, because he postpones the ultimate disposition of the *Dundonald* estate until he has brought up the order of ownership, under the devises of the *Delamont* estate, to a corresponding and parallel point with what he had previously declared as to the *Dundonald* estate, and then he takes up an event applicable to both estates, namely, the event of neither of them permanently vesting. And what follows, therefore, is a general direction to the trustee with regard to all the estates comprehended in the prior devises, when those prior devises fail, a

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direction that he is to hold the estates to the uses subsequently declared.

Therefore, my Lords, this case is to my mind free from the difficulty which I felt at one time; and I consider that the judgment of the Vice-Chancellor in *Ireland* is quite correct, and that the appeal ought to be dismissed.

LORD COLONSAY:—

My Lords, as the opinion which I formed upon this case at the hearing is perfectly in accordance with the opinions which have been expressed by my two noble and learned friends who have last spoken, and also with the learned opinion which I have seen of my noble and learned friend near me (Lord *Cairns*), I shall merely state in a sentence the point that has weighed mainly with me in the opinion I have formed.

My Lords, I look upon this part of the will as a direction to vest. Certain persons are to hold the whole estate, and the testator tells them what they are to do. First, as regards the *Dundonald* estate, they are to hold to the use of *Robert* and his descendants, and afterwards of *James*. Then as to the *Delamont* estate, it is the converse, bringing in *Robert's* descendants last. Then comes the passage which has given rise to this question, "and in default of such issue male and female of all the sons and daughters of my said sons *Robert* and *James* then in trust," and so on. Now, it appears to me that there is here an interruption of the course of language which has immediately preceded. There is, it may be said, a dislocation of the continuity of the form of expression. If the continuity of expression had been preserved uninterruptedly, I should have expected the testator would say, "in default of such issue of my son *Robert* then to the use of" so and so. But that is not said. It is, "in default of such issue, male and female, of all the sons and daughters of my said sons *Robert* and *James*;" bringing in *Robert* first, who is the leading party in the *Dundonald* devise; and then *James* being the leading party in the *Delamont* devise. And, as my noble and learned friend says, in that position of matters, starting with a new direction to the trustees as to the object of the trust. And then follows what would naturally be the mode of dealing with both estates. I think there is here sufficient

to warrant us in saying that there is no violation of grammatical construction in holding these words to apply to both estates, and no violation of any rule or canon of construction in doing so. If we were forced to go into the inquiry as to what were the particular results of taking the one course or the other, I think it has been pretty well shewn that in either view of the matter there were imperfections in this will. It did not accomplish all that one might expect or conjecture that the party intended; but one of the last expectations that I should have entertained with regard to a will professing to deal so minutely with such important estates would be this, that one of the most important (if not the most important) parts of the estates would be left to be gathered up in a general residuary clause which did not deal specially with that estate at all. That that was the purpose or intention of the party is, I think, extremely unlikely; and when I find that the other construction satisfies all rules of grammar and all canons of construction, I concur in the judgment pronounced by the Vice-Chancellor in the Court below.

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LORD CAIRNS:—

My Lords, the testator in this case, at the date of his will in 1836, had two sons and one daughter. The elder son, *Robert*, had been married eleven years previously, but had no children. The younger son, *James*, and the daughter, *Jane Maria*, were both unmarried. The testator was a member of the legal profession, and had practised as a solicitor. In 1797 he had succeeded, on the death of his brother, to an estate, which has been called the family estate of *Florida Manor*, which appears to produce a rental of about £1800 a year, and to have a mansion-house (in which the testator resided) and demesne valued at £418 a year. He subsequently acquired by purchase the *Delamont* estate, the rental of which is about £1470, with a mansion and demesne valued at £286 a year; the *Dundonald* estate, the rental of which is about £1442; the *Longfield* or *Tyrone* estate, consisting of a profit rent of £987; and some outlying land adjoining or near the *Florida Manor* estate, worth about £792 a year. The annual value of the whole real estate may thus be taken at about £7195, of which £3010 would represent the *Florida Manor* estate and its accretions.



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On the marriage of the testator's elder son, *Robert*, in 1825, he had settled the original *Florida Manor* estate, and one of its additions, *Ballykeigle*, limiting estates to the first and other sons of that marriage in tail male, with reversion to the testator in fee, with a power for the son *Robert* to jointure and raise portions for any wife and younger children of a subsequent marriage, but no estates were limited to sons other than those of the marriage then intended.

In this state of things the testator made his will. It is a document expressed in technical language, and professing to use technical forms of limitation, but it must be, and was, admitted that, in every view of its construction, it exhibits a considerable amount either of ignorance or carelessness as to the manner in which these limitations are attempted to be connected with each other, or with the limitations in the marriage settlement to which the will refers. It is a technically, but certainly not an accurately, expressed instrument.

The testator recites the settlement of 1825, as if it had limited estates in tail male to all the sons of his son *Robert*, which we have seen it did not do. He charges annuities for his wife and brother, and also his debts and legacies, in the proportion of two-thirds and one-third, on the estates devised to his sons *Robert* and *James* respectively. He then vests in a trustee the whole of his real estate by specific description, including his reversion in the settled property. He then limits a term of 200 years in all the estates, except the reversion, to trustees to secure the annuities, debts, and legacies in the proportion already mentioned. He then, as to the *Dundonald* estate, some outlying farms adjoining the *Florida Manor* estate, and one-half of the *Tyrone* estate, limits uses to *Robert* and his sons successively in tail male and tail general, with remainder to *James* and his sons in tail male and tail general, with remainder to the daughters of *Robert* and of *James* successively in tail male; and he then suspends, or at least stops, the limitations as to this portion of his estates. He then, as to the *Delamont* estate and the other half of the *Tyrone* estate, limits uses to *James* and his sons successively in tail male and tail general, with remainder to *Robert* and his sons in tail male and tail general, with remainder to the daughters of *James* and *Robert* successively in tail male. He then continues: "In default of such issue, male

and female, of all the sons and daughters of my sons *Robert* and *James*, then in trust and to the use of" his daughter *Jane Maria* and her first and other sons and first and other daughters in tail male, remainder to his brother for life, remainder to various nephews (including the Respondent) for life, and first and other sons in tail male, then to nieces and other nephews in the same manner.

The question is, is this last limitation, commencing with the words "in default," &c., to be confined to the *Delamont* estate limited to *James*, or does it take up and carry on also the suspended or interrupted limitations of the estate limited to *Robert*? In other words, is the subject matter of this limitation, "in default of all such issue, male and female, of *Robert* and *James*," the lands only which (to use the language of the testator in the former part of his will) were devised to *James*; or is it the lands which were devised to *Robert* as the first taker as well as the lands which were devised to *James* as the first taker?

On the answer to this question must also depend the fate of the reversion in the settled property, for in a subsequent part of the will this is devised to the same uses (I will refer more particularly afterwards to the exact words used) as the lands limited, in the first instance, to *Robert*.

In order to explain more clearly the view which I take of the will, I will illustrate it by what appears to me would be an equivalent or similar devise in a shorter form: I give to my trustee *Blackacre* and *Whitacre*: as to *Blackacre*, in trust for my son *Robert* and his issue; then for my son *James* and his issue. And as to *Whitacre*, in trust for my son *James* and his issue; then for my son *Robert* and his issue. And in default of all the issue of my sons *Robert* and *James*, then in trust for my daughter.

In my opinion, the devise over to the daughter thus expressed is ambiguous. It may refer to *Whitacre* alone, or it may include both *Blackacre* and *Whitacre*. It is possible, and it may be conceded, that the former construction is the more grammatically accurate; but few testators do—certainly this testator did not—conform rigidly to the rules of correct writing. It is possible that in reading the words of the devise a particular meaning may be to some extent impressed on them by intonation or pause; but that is only another way of expressing that words found in a writing

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which is itself mute and without break or stops can be legitimately made to bear two meanings.

If the devise I have supposed may be taken, as I think it fairly may, to be an equivalent or reproduction in a shorter form of that in question in this appeal, and if I am right in saying that it is open to two constructions, we must resort to every part of the will in order to ascertain which construction is in this case to be preferred.

I take the law on this subject to have been expressed with much accuracy and felicity by Lord *Cranworth*, than whom no Judge more consistently adhered to sound and strict principles of construction in the interpretation of wills. In the case of *Abbott v. Middleton* before this House (1) Lord *Cranworth* speaks thus: "Where by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable."

I may observe that in the particular clause of this testator's will on which the question arises, there are in the form of the clause itself symptoms that it is not intended to be merely a sequel of the clause immediately preceding. It does not run "in default of such issue female of my son *Robert*," which would leave the mode of connection similar to that used by the testator in the previous limitations of *Delamont*, but "in default of all such issue male and female of all the sons and daughters of my said sons *Robert* and *James*," as if the testator were now taking a comprehensive view of all he had previously given to *Robert* and *James* and their issue. The words "in trust" are introduced, and not merely "to the use;" and the order in which the names of the sons are given would not tally with the order in which *Delamont* alone was to be enjoyed.

(1) 7 H. L. C. 89. *5 Jan 45. 719*

I turn, however, to the general scheme of the will. The *Florida Manor* estate was the original and hereditary property of the testator. He had made a considerable addition to it before the marriage of his elder son, and had settled the whole on the occasion of that marriage. By the will a still farther addition is made to the provision for the elder son and his family, and, by the conjoint operation of the will and settlement, property of the value of about £4800 a year is settled in the first place upon that son and his family, and then added to the property assigned to the second son. Except so far as is necessary to make this separate provision for the two sons, there is the most marked desire to keep the property entire and in the family, and to settle it strictly. Estates in tail male are given to sons before estates in tail general. Daughters, when they take, are to take successively and not concurrently. In the limitations commencing with the clause in dispute, the testator's daughter *Maria* and her issue are made the next objects of his care after his sons, and the nephews and nieces, sons and daughters of brothers, are made to take estates for life, with remainders to their sons in tail male, in priority to nephews, sons of a sister, and their issue. Bearing in mind that the original separation of the testator's estates was made for no other purpose than to let in, as to the larger portion, the elder son and his issue before the younger, and as to the smaller portion, the younger son and his issue before the elder, it would be strange indeed—it would (in the language of Lord *Cranworth*) be acting without any intelligible motive, and contrary to the ordinary mode in which men in general act in similar cases, if the testator, after failure of his sons and their issue, carried on the smaller portion to his daughter and her issue, and his nephews and nieces and their issue, but left, in the very same event, the larger portion, comprising the hereditary estate and family residence, absolutely derelict and unnoticed, so far as any specific devise is concerned.

But let us consider what, upon the construction of the Appellant, would become of this larger portion of the estates on failure of the two sons and their families. Technically, no doubt, there would not be an intestacy. Technically, the drag-net words of the residuary gift, although they contain no reference to the seisin of the trustee, or to the previous uses declared upon that seisin,

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would catch up any undisposed-of real estate, and carry it to be divided equally between the two sons. But a testator rarely contemplates by such a gift the making good of deficiencies in the completeness of a specific devise; and, being here on a question of intention, it is, in my opinion, impossible to read this will and to suppose that the testator, who, on the theory of the Appellant, had, up to this point, made no disposition of the great bulk of his estates failing the possible issue of one son who was unmarried, and another who had been married eleven years without children, imagined that by the vague and precautionary words of the residuary gift he was disposing of an interest so valuable and so proximate. Being then, I repeat, on a question of intention, we are driven to the alternative of supposing either that the testator had forgotten that no disposition had, in the not improbable event I have mentioned, been made of his principal property, or that he supposed and intended it in that event to go over along with the minor portion to his daughter and his nephews and nieces. I cannot hesitate as to accepting the latter branch of the alternative.

It is farther to be observed that in the early part of the testator's will he had divided his landed property into two portions, which (including the settled property) were, as nearly as possible, two-thirds and one-third, styling the one "the lands devised to my son *Robert*," and the other "the lands devised to my son *James*," and charging two-thirds of his debts, legacies, and annuities on the former, and one-third on the latter, and providing by means of a term of years for payment of these charges in those proportions. It is scarcely possible to suppose, consistently with these provisions, that the testator intended, through the medium of his residuary gift, to allow the larger portion of his estates to fall, in a not improbable event, to be divided between his sons equally, with debts and legacies expressly charged equally over the whole.

Again, it might well have been that the daughter of the testator had survived her brothers, and had a family. According to the Appellant's construction, the testator's grandchildren by his daughter would in that event be excluded from the family estate, although it had been limited so as to go to daughters of his sons, had there been any. Can it be supposed, looking at the scheme of this will, that this was the intention of the testator? And if the words

admit of two constructions, must we not adopt the one which would prevent such an anomaly? It was said, however, that in the limitations of the estate to the issue of *Robert* and *James* no estate in tail general is given to daughters; and that, therefore, daughters of daughters would not take; and that the remainder in fee was, or might be supposed to be, given to the testator's sons to enable them to provide for an unprovided class of grandchildren.

I must own that this argument fails to carry any weight to my mind. In the first place, it proves too much; for in the limitations of the *Delamont* estate also there is no estate given to daughters in tail general; so that *Robert* might have died leaving issue enjoying the larger estate, and *James* might have died leaving a daughter of a daughter; and the *Delamont* estate would clearly have gone over; and yet it is not pretended that any provision for that granddaughter could have been made through the residuary gift. Again, the sons of *Robert* by a second marriage are, as I have before said, not included in the limitations of the settled estate, so that the settled estate might have gone over to *James* and his issue, although sons of *Robert* by a second marriage were living, and yet no provision could be made for them by their father through the residuary gift.

In fact, no testator, when he settles his estate specifically and strictly on various classes of issue, intends by a general residuary gift to make an indirect provision for other classes of that issue. He knows that what he gives as residue, if he gives it absolutely, may be dealt with and alienated to strangers. If he thinks of the other classes of issue, and desires to provide for them, he does it directly. In this case the omission of daughters of daughters, and of sons of a second marriage, must have been either designed or accidental. If it was designed, which is improbable, it is unlikely that they were intended to be compensated by the possibility of an uncertain and precarious benefit at the option of others. If it was accidental, and owing to the unskilful construction of the will, which, I think, is obviously the true explanation, then no argument as to the intention of the testator can be founded on it.

I now come to the mode in which the testator deals with his reversion in the property settled on the marriage of his elder son. He devises it, in the first instance, "to the uses hereinbefore declared concerning" the lands devised to *Robert* and his issue,

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“in default of issue of the sons of my son *Robert*.” There is no doubt that, technically and in law, these words would carry the reversion to and through all the uses, whatever they might be, to which he had limited these lands. But the testator continues, “and all the subsequent uses and limitations thereafter limited and declared concerning the same.” What is the meaning of these latter words? The theory of the Appellant gives them no meaning, and suggests no reason for their use. It treats them simply as surplusage. But upon the Respondent’s construction of the will they have an obvious meaning. The lands which the testator describes as the lands devised to *Robert* stood limited by the will to *Robert* for life, and then to his sons in tail. In default of sons and their issue came limitations to *James*, sons of *James*, daughters of *Robert*, daughters of *James*; and then the limitations of these lands stop and are interrupted, and the devise of *Delamont* to *James* comes in. Then, according to the Respondent, the limitations of the lands devised to *Robert* are resumed, and made to run on along with the limitations of the land given to *James*. These latter limitations are just what might be described by the testator as “the subsequent uses and limitations *thereafter*” (that is, after the first set of limitations) “limited and declared concerning the same.”

It was said that this reversion is devised to uses which are described as those following a failure of issue of all sons of *Robert*, whereas no sons of a second marriage could take under the settlement; and also, that if the “subsequent uses” mean the uses I have described, those uses again are mentioned in the will as arising on failure of all male issue of sons—that is, of all sons. Both these observations are, no doubt, correct, but the reference being merely to describe and identify the uses, the inaccuracy is not material, and, at all events, it does not bear on the argument as to the intention of the testator.

The leasing power also, in my opinion, supports the view of the Respondent. It refers to the two divisions of his estate, which he here terms “the premises before limited to *Robert* and *James* respectively;” and he contemplates that in each of these portions there would or might be, after both *Robert* and *James* were out of the way, a tenant for life in possession under his will. But in one of the portions, and that the larger, there would be no tenant for

life after *Robert* and *James*, if the construction of the Appellant were correct.

I may refer, lastly, to the power of jointuring. I read that power as an absolute power to *James*, and a conditional power to each nephew; for it was agreed that “nephew” in the power was *nomen collectivum*. What, then, was the condition on which a nephew was to exercise his power of jointuring? “On his remainder for life becoming vested in possession of *my said estates*.” To what do the words “*my said estates*” refer? It is not “the estates devised to him;” and I think it clearly means “*all my said estates*,” recognising the fact that there was a complete devise of all, and that if a nephew came into possession of any, he would come into possession of all the estates.

I have endeavoured, at some length, to express the reasons why I think the construction put by the Vice-Chancellor of *Ireland* upon this difficult will was correct. No degree of moral certainty as to what was intended would justify a construction of the words which a testator has used unwarranted by the rules, well defined and established, for the interpretation of wills. But applying, as I have endeavoured to do, those rules, it is satisfactory to find that they lead me to a conclusion which supports, as any other conclusion would appear to me to defeat, what I cannot doubt, (treating it as a question of moral persuasion,) was intended by the testator.

I am of opinion that the decree ought to be affirmed.

LORD CHELMSFORD :—

I submit to your Lordships that this appeal ought to be dismissed with costs, and I beg to move accordingly.

*Decree appealed from affirmed; and appeal dismissed with costs.*

*Lords' Journals, 8th June, 1871.*

Solicitors for the Appellant *Mary Gordon*: *Markby & Turry*.

Solicitors for Sir *Lionel Smith Gordon*: *Vizard, Crowder, & Co.*

Solicitors for the Respondents: *Gregory, Rowcliffes, & Rawle*.

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1871 THE ATTORNEY-GENERAL. . . . . APPELLANT;  
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*Succession Duty Act.*

1 Ex D. 205.  
 4 App Cas 435

That person is the "successor," within the meaning of the 2nd and 15th sections of the *Succession Duty Act*, in whom existed a title to property before the Act came into operation, but who, by an event occurring after the Act, became entitled thereto in possession.

The true "successor," in the sense of the individual liable to pay duty, is the person coming into the possession of the property upon the expiration (after the Act), by death or otherwise, of a particular intervening estate.

The Act applies only to persons who, before the time of its passing, were, in law, entitled to a vested interest in the property, but could not enjoy it in possession until after the passing of the Act.

The 15th section of the *Succession Duty Act* does not impose any new duty upon the person taking by alienation, but, where reversionary property passes through a succession of persons, secures payment of the duty imposed by the previous sections applicable to such a case.

Personal property to a large amount was, in July, 1829, settled on the proposed marriage of *J. D.*, for herself and her intended husband *C.*, for their joint lives, and the life of the survivor—then to their children—with a power of appointment in *J. D.*, the appointment to take effect after the death of *J. D.* and of her husband. In default of appointment, the property was, subject to the husband, *C.*'s, life estate, to be held on trust for such of *J. D.*'s next of kin as would be entitled if she had died unmarried and intestate. *J. D.* married *C.*, but died childless, and without having exercised the power of appointment. About two months before Mrs. *C.*'s death, her mother, Mrs. *D.*, made a will giving all her property to Mrs. *C.* and her husband for their lives and the life of the survivor, then to their children, and in default, to her own brothers and sisters and a nephew. This will was never altered. Mrs. *C.* died in August, 1831, and her mother, Mrs. *D.*, then became, under the settlement of 1829, entitled to the reversionary interest in the settled property, subject to *C.*'s life estate. Mrs. *D.* died in July, 1832. The *Succession Duty Act* came into operation in 1853. *C.* lived till 1868. The brothers and sisters and the nephew of Mrs. *D.* then became entitled in possession to the reversionary property bequeathed by her will:—

*Held*, that there was no succession duty payable under sect. 2 of the *Succession Duty Act* in respect of the interest which vested in Mrs. *D.* on the death of her daughter; that, consequently, her estate was not liable to pay such duty; that, under her will, her legatees were liable for legacy duty under the Legacy Duty Acts; and that, being so liable, they were, under the concluding part of the 18th section of the *Succession Duty Act*, relieved from any farther payment under that Act.

THIS was an appeal against a decision of the Court of Exchequer upon the construction of the *Succession Duty Act*, 1853 (16 & 17 Vict. c. 51).

By a marriage settlement, made in July, 1829, personal property to a large amount was settled on the intended marriage of *Juliana Elizabeth Dawkins* with *John Blenkinsopp Coulson*, at that time a lieutenant in the Grenadier Guards. The original trustees of the settlement are now represented by the Respondents. The trusts of the settled property were for Mr. and Mrs. *Coulson* for their joint lives and the life of the survivor, then for their children, with a power of appointment, reserved to the lady, to be exercised by her notwithstanding coverture, and to take effect after the deaths of herself and her husband. In default of appointment the settled property, subject to the life interest of the husband, was to be held in trust for such persons as, at the death of the intended Mrs. *Coulson*, should be entitled to the same, as part of her personal estate, had she died unmarried and intestate. The marriage took place in 1829. Mrs. *Dawkins*, the mother (and sole next of kin) of Mrs. *Coulson*, on the 12th of July, 1831, made her will, and, after a specific bequest to her daughter, bequeathed all her own property to her brothers *Charles* and *Henry Littledale*, in trust for Mr. and Mrs. *Coulson* for their lives, then for their children, and in certain events (which happened) for the benefit of her own brothers and sisters and a nephew. Mrs. *Coulson* died on the 27th of August, 1831, without having made any appointment under the powers reserved to her in the settlement, and without having ever had a child. Mrs. *Dawkins*, who, under the settlement, had thus become entitled to a reversionary interest in the settled property, survived her daughter for about twelve months, made no alteration in her will, and died in July, 1832. Mr. *Coulson* survived till 1868.

The trustees under the settlement of 1829 then paid succession duty at the rate of £1 per cent. on Mrs. *Dawkins'* interest in the settled property, which interest had become vested in her on her daughter's death without appointment, but which, on account of the life estate of Mr. *Coulson*, did not vest in the Respondents in possession until his death in 1868.

The question then arose whether the legatees under Mr. *Dawkins'* will were also liable to £3 per cent. duty in respect of her bequest of that part of her property which had been the subject of the settlement of 1829.

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The Respondents did not deny their liability to pay the £3 per cent. duty on the bequests to them from Mrs. *Dawkins*, but they insisted that the £1 per cent. succession duty already paid by the trustees under the settlement of 1829 had been paid in mistake, and ought to be allowed them in account in their payment of the duty payable by them.

The Attorney-General filed an information in the Court of Exchequer, where the case was heard on the 3rd of June, 1870, and on the 7th of July judgment was delivered (1). The Court

(1) Law Rep. 5 Ex. 275. The sections of the *Succession Duty Act* particularly referred to were these:—

*Port 297* Sect. 2. "Every past or future disposition of property by reason whereof any person has, or shall, become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, and either certainly or contingently, or by way of substantive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition or devolution a 'succession'; and the term, 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote settlor, disposer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Sect. 14. "Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor

who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every successor had been subject to duty, would have been payable by any one of them."

Sect. 15. "Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation or other derivative title, in any person other than the person who shall have been originally entitled thereto, under any such disposition or devolution as is mentioned in the 2nd section of this Act, then the person in whom such property shall be so vested, shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with, if no such alienation had been made or derivative title created; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto, or to the income thereof in possession, have become vested by alienation, or by any title not conferring a new succession, in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created."

Sect. 18. "No person charged with the duties on legacies and shares of per-

declared that "legacy duty at the rate of £3 per cent. is not payable in respect of such parts of the property comprised in the residuary bequest contained in the will of Mrs. *Dawkins* as were comprised in or subject to the trusts of the settlement of 1829, in addition to the succession duty of £1 per cent. already paid in such last-mentioned property, and that no farther legacy duty is payable on such last-mentioned property."

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This appeal was brought against that decision.

Sir *R. Palmer*, Q.C., and Mr. *W. W. Karlake*, for the Crown:—

The interest here, by the death of the daughter without appointment and without children, devolved on the mother, and was a reversionary interest in her. The life estate which prevented this reversionary interest from coming into possession was that of Mr. *Coulson*. He lived until long after the *Succession Duty Act* came into operation. When he died it fell into possession, and the Respondents then became beneficially entitled in virtue of "a past disposition of property." A reversionary property coming into possession upon a previously vested title, in consequence of "a person dying after the time for the commencement of the Act," becomes under the 2nd section a "succession," whether it happens "immediately, or after any interval," from the time when such disposition was made. The words of the section relate to "a past disposition of property which any person has or shall become entitled to." These words exactly describe the present case. The disposition of the property was "a past disposition," and Mrs. *Dawkins* "had become entitled" to it. The words "have become entitled" in the 2nd section mean "entitled before the passing" of the Act. That was the case here; and by force of the retrospective words in sect. 2, Mrs. *Dawkins*' legatees became liable to be charged with succession duty due from her estate in respect of her title to the reversionary property. It makes no difference that the property when it came into possession came into the possession not of Mrs. *Dawkins* personally, but of her executors; it came into

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sonal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property."



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their possession as part of her personal estate, and so was liable to succession duty. In *Wilcox v. Smith* (1) the will was made in 1826 in favour of *A.* for life and his sons in tail. The testator died in 1827. *A.* had a son, *B.*, who was born in 1853 before the Act came into operation, whose interest vested on his birth, but who did not become entitled in possession till July, 1853, when *A.* died. Vice-Chancellor *Kindersley* there held that the Act affected persons entitled in interest though not in possession, and that *B.* was liable to pay succession duty. That case was acted on in *The Attorney-General v. Middleton* (2), where there had been by will a gift to *D.* for life, remainder to *H.* for life, and to his son in tail male. The testator died in 1835, *H.* died in 1845 and while *D.* was still alive, and therefore *H.* never came into possession. *D.* died in 1856, and then *H.*'s eldest son who, as first tenant in tail, had been entitled, succeeded in possession. He was held liable under the 2nd section of the *Succession Duty Act*. The 15th section clearly shews that the Respondents are liable. They hold by a derivative title, and are persons "other than the person originally entitled." In *The Attorney-General v. Rushton* (3) there was a devise to a wife for life, then to a person who was a stranger in blood to the testator. That person died during the continuance of the life estate, and before the passing of the Act; his son and heir thereon became entitled, but did not come into possession till after the passing of the Act, and it was held that the property vested in him by "a derivative title" within the meaning of the 15th section, and he was charged a duty of £10 per cent., which was the duty that would have been payable by his father had the father succeeded on the dropping of the life estate. [LORD CHELMSFORD:—Mr. *Coulson* died in 1868. Mrs. *Dawkins* had been dead many years. How can she be said to be a person "who has or shall become entitled to a succession" after the Act?] The words "has or shall become" refer to a title acquired before the Act passed, but where by death after the Act the property comes into possession. The other words "shall be deemed to have conferred" clearly require that interpretation, and also describe a title acquired some time before, but not enjoyed in possession till

(1) 4 Drew. 40. *3 H. & N. 664* (2) 3 H. & N. 125.

(3) 2 H. & C. 812.

then. If Mrs. *Dawkins* had acquired her title under a will, and had then by her own will created a title in these Respondents, there might have been two legacy duties payable. Here was a derivative title created, and the object of the Act was to secure duty in cases of succession where it might not be payable under the Legacy Duty Acts.

The funds here were part of Mrs. *Dawkins*' general estate, and might have been dealt with as such by her executors. They were therefore chargeable with duty in respect of her estate to the possession of which they had succeeded. There were, in fact, two acquisitions of the property, and duty was payable in respect of each.

Mr. *Jessel*, Q.C., and Mr. *W. F. Phillimore* appeared for the Respondents, but the case was adjourned without their being called on to address the House.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, the question in this case is one which lies in a very brief compass.

By information in the Exchequer the Attorney-General seeks to recover both succession duty in respect of certain property which was to be vested in a Mrs. *Dawkins* under the circumstances I am about to state, and also legacy duty with reference to a bequest which she made of that property in favour of her brothers and sisters.

The facts are very few, and it is unnecessary for me at this moment to go into any great detail of them. There was a settlement made on the marriage of a lady who, in 1829, became Mrs. *Coulson*. It was a settlement of very considerable property, and there being an interest in the lady who became Mrs. *Coulson* for her life, and in her husband for his life, then, in the event of Mrs. *Coulson* dying without children (an event which took place), the property was, subject to Mr. *Coulson*'s life interest, to vest in her mother, Mrs. *Dawkins*. Mrs. *Coulson* unfortunately died soon after the marriage, and she died without children, and in the lifetime of her mother; so that in the year 1831 Mrs. *Dawkins* was

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entitled to this property, subject only to the life interest of Mr. *Coulson*. Mrs. *Dawkins* herself died in 1832, more than twenty years before the passing of the Act by which succession duty was imposed; and by her will, which had been made before her daughter's death, she had bequeathed all her property (subject to certain interests) to her daughter (Mrs. *Coulson*) and her daughter's children. This bequest had failed before the death of Mrs. *Dawkins* herself, and the property on Mrs. *Dawkins*' death passed to Mrs. *Dawkins*' executors, in trust for her brothers and sisters. That is the simple statement of the case.

Therefore at the time of the passing of the *Succession Duty Act* the state of things was this:—the executors of Mrs. *Dawkins* were entitled, and had been for about twenty years entitled, to a reversionary interest dependent upon the life of Mr. *Coulson*, in trust for the legatees of Mrs. *Dawkins*. When Mr. *Coulson* died, which was not till the year 1868, and after the passing of the Act imposing succession duty, the trustees of the settlement paid a succession duty of 1 per cent. to the Revenue, in respect, of course, as they at that time considered, of the duty that would be payable on the interest which would have been taken by Mrs. *Dawkins* (as Mrs. *Coulson*'s sole next of kin) had she been alive. Then a second demand was made on the part of the Inland Revenue for legacy duty in respect of the bequest made by Mrs. *Dawkins*' will in favour of her brothers and sisters, which duty would be 3 per cent. Those who represented the brothers and sisters declined to admit that the estate was liable to the 1 per cent. as paid by the trustees of the settlement on account of the succession by Mrs. *Dawkins* to her interest in this property, together with the legacy duty payable by them as her legatees. They offered to pay the 3 per cent. legacy duty, which they said ought, under the true construction of the *Succession Duty Act*, to cover the whole amount of duty to which they were liable. The learned Judges in the Exchequer held that in this view of their liability they were right. There was some slight doubt, or hesitation, on the part of the Lord Chief Baron, but no doubt or hesitation whatever on the part of the other Judges; and the Chief Baron not coming to any definite conclusion one way or the

other, the other Judges decided (and that is the decision now appealed from) that only one duty was payable, namely, the legacy duty in respect of the bequest made in Mrs. *Dawkins*' will to the brothers and sisters.

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My Lords, the learned Judges who delivered judgment gave two reasons, either of which would be sufficiently satisfactory upon this point, for holding that one duty only was payable. In the first place, Mr. Baron *Bramwell* took this view. He said, "I do not find that under the Act truly construed, and looking especially to sect. 2, Mrs. *Dawkins* herself, or any interest that she took in the property, would be a proper subject of taxation, or was intended in any way to be taxed. Mrs. *Dawkins* had died twenty years before the imposing of this duty. She had by the death of her daughter acquired a full and complete interest in this property, subject only to the life interest of Mr. *Coulson*, and having acquired that interest she had disposed of it by way of legacy to her brothers and sisters, and therefore legacy duty was properly payable in respect of that. Now, that interest by legacy would come into *esse* upon the death of Mr. *Coulson*, and therefore upon that legacy duty would become payable. In respect of the same interest becoming vested at the same time, there could be only one duty payable."

The other Judges said, "Even supposing, again, you treat Mrs. *Dawkins* as alive at the date of the passing of the *Succession Duty Act*, by sects. 14 and 18 of the Act it is clear that only one tax would be payable, namely, that which had to be paid in respect of the legacy duty." This appears to me to be extremely clear, and I believe that it appears also to your Lordships to be the plain construction and meaning of the Act, and therefore we have not called upon the counsel for the Respondents, but have only heard the counsel for the Crown in this matter.

The 2nd section, to which Mr. Baron *Bramwell* refers, is this:— [His Lordship read it (1)]. That learned Judge said, in reading those words, "Though undoubtedly the Act is retrospective, and applies to the reversionary interest of any person in existence at the passing of the Act who has become entitled to a property in reversion, but not in possession, and has not been in full enjoy-

(1) See *ante*, p. 292.



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ment till the Act passed, it seems a somewhat singular interpretation of the Act of Parliament to hold that it can by any sound principle of construction be intended to apply to a person who had been dead twenty-one years before the passing of the Act. This person might have disposed of her reversionary interest in any way in which she thought fit during her lifetime without being subject to any taxation, the reversionary interest not being taxed till long after the period when she was resting in her grave."

Then the case would be simply this, that the Act would apply merely to the persons who at the time of the passing of the Act were interested in this property, but dependent upon a life which should drop after the passing of the Act; that is to say, the brothers and sisters of Mrs. *Dawkins*, who at the time when the Act passed were all of them entitled to this property as beneficiaries, subject to the life interest of Mr. *Coulson*, and then when the time came they would have to pay a duty; but by virtue of sects. 14 and 18 they would not have to pay a double duty. Sect. 14 is this:—[His Lordship read it.] In this instance, supposing that Mrs. *Dawkins* had been alive, her interest in the property would have devolved upon her death to her residuary legatees. They would be awaiting, as she had been awaiting, the interest in possession, and then, when it came to them, they would have to pay the duty. And the statute takes care that if the duty upon this species of devolution is of a larger amount than would have been paid by the person originally entitled, such larger duty shall be paid, because the words with which the section concludes are these: "Such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them."

The Act says again, at the end of sect. 18—which is rather a long section, referring in many respects to several other things:—[His Lordship read the section]—that no person charged with duties under the Legacy Duty Acts shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property. That is exactly what happened to these brothers and sisters. They had become, by the death of Mr. *Coulson*, the persons entitled to the succession, and therefore in that sense they

were successors, and had to pay the duty. They became entitled, at the same moment, by the same event, and under the same circumstances, under the will of Mrs. *Dawkins*, to this property in respect of which they had to pay the legacy duty; and having to pay that, the one duty only is payable.

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The section relied on by the counsel on behalf of the Attorney-General was the 15th section, which says:—[His Lordship read this section.] I apprehend that the observation of Mr. Baron *Bramwell* upon that section is perfectly just—that it does not impose any new duty whatever upon the persons who may take by alienation. All that it provides for is this, that when reversionary property is passed through a succession of persons—for that may occur during the lifetime (which may be a very long one, as it was in this case) of the tenant for life—then care shall be taken that the duty shall be secured. The persons entitled to the property in this case became so entitled under Mrs. *Dawkins*' will long before the passing of this Act, subject to the life interest of Mr. *Coulson*; then upon his death they become possessed of it, and have to pay the duty in question. If Mrs. *Dawkins* had survived, and had disposed by will of the property in the same way, but had never herself enjoyed the fruits of it, or come into possession of it, then, according to the 14th section, there would have been a change, because the interest would have been transmitted to others before it had ripened into enjoyment, and those others would have had to pay a higher duty than the person originally entitled. But when that higher duty is paid in the shape of legacy duty, the succession duty by virtue of the final clause of the 18th section is not payable. Under these circumstances, even taking the extraordinary construction of the Act (for it would be an extraordinary one), that the 2nd section ought to apply to a person who had been dead twenty years before, I do not think it would make any difference at all. It all comes round to the same point—that these persons who are now taking in this way are taking subject to the payment of legacy duty, and, paying that, are not bound to pay anything farther.

It seems to me, therefore, my Lords, that the decision of the Court below is perfectly right, and that this appeal ought to be dismissed, and dismissed with costs.

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LORD CHELMSFORD:—

My Lords, the question upon this appeal is whether, besides the legacy duty paid under Mrs. *Dawkins*' will, succession duty was payable upon the reversionary property which she bequeathed to the Respondents, her executors, in trust for her brothers and sister and nephew?

In order to establish the right to this duty, it was necessary for the Crown to prove that there was not only a succession under the will of Mrs. *Dawkins* (upon which the legatees having been charged with legacy duty could not by the 18th section of the *Succession Duty Act* be called upon to pay succession duty) but that there was also a succession in Mrs. *Dawkins* herself.

For proof that there was such a succession the language of the 2nd and 15th sections was relied upon. Those sections enact that:—[His Lordship read the 2nd and the 15th sections.] Taking these two sections together they appear to me to point to the person in whom, at the time of the commencement of the Act, by a disposition made before the Act, the reversionary property expectant upon a death has become vested.

Now the Defendants were, at the time of the commencement of the Act, the persons in whom the property chargeable with duty had become vested by the alienation of the person originally entitled thereto. For the disposition of the property by the will of Mrs. *Dawkins* had become absolute by her death before the time of the commencement of the Act. If Mrs. *Dawkins* had alienated the reversionary property by deed *inter vivos*, and had been living at the commencement of the Act, there would not have been two succession duties payable, one by her upon the property vested in her under the settlement of 1829, and another by the alienee upon his acquired property under her alienation. But by the express words of the 15th section the property could have been charged with one succession duty only, and that payable by the person in whom the property was vested "at the same time and at the same rate as the person originally entitled would have been chargeable with if no such alienation had been made." The Defendants, being the persons in whom the property was vested by alienation at the time when the duty became payable, would have been bound to pay succession duty in respect of it. But the

property being personal, and the disposition of it by will, the shares of the legatees were charged with the duties and legacies under the Legacy Duty Acts, and therefore could not be charged also with the duty charged by the *Succession Duty Act* in respect of the same acquisition of the same property.

Upon these short grounds I think the decree of the Court of Exchequer should be affirmed.

LORD WESTBURY:—

My Lords, it is certainly true, as was contended at the Bar, that the *Succession Duty Act* applies to any disposition of property or settlement, however remote; but that is, provided there be, at the time when the Act takes effect, some person entitled to a limited estate or a particular interest under that disposition or settlement, and who survives the time appointed for the commencement of the Act, and dies after that time. It is equally true that the individual who, according to the terms of the disposition, would have taken upon the death of that tenant for life or tenant of a particular interest, that individual, although dying long before the time appointed for the commencement of the Act, is, in a certain limited sense, called a “successor,” because you may have to refer to that individual in the course of subsequently ascertaining the amount of succession duty. But the true successor, in the sense of the individual liable to pay the duty, is the person entitled upon the expiration, by death or otherwise, of the particular estate. You may have to refer to the person who previously became entitled in interest, although he never lived to become entitled in possession, for the purpose of ascertaining the amount of the interest; but you cannot refer to that person for the purpose of proving that that person became entitled to a succession in the sense of having to pay money thereon.

Under the settlement made in this case upon the marriage of Mrs. *Coulson*, the ultimate limitation, upon a certain contingency happening, was to the next of kin of Mrs. *Coulson*—her mother, Mrs. *Dawkins*, answered that description. The mother, therefore, became entitled in expectancy upon the death of Mr. *Coulson*, who survived his wife, to the property comprised in the settlement. The mother died in 1832, and the title to the property so limited

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to the mother under the settlement has been transmitted to the present Defendants, and transmitted by virtue of the will of Mrs. *Dawkins*. Now, supposing that Mrs. *Dawkins* would have been liable to pay, if she had outlived the tenant for life, a greater amount of duty than the person who became entitled under her, the Crown would have had a right to refer to the interest originally vested in Mrs. *Dawkins* under the settlement. But it is quite clear that the only succession duty that arises here arises upon the death of the tenant for life. It was a great mistake, therefore, to suppose that upon the death of Mrs. *Dawkins* there was in point of fact a succession which became vested in her, and became liable to duty. There was no such thing. She had an expectant interest in what ultimately turned out to be a succession.

Therefore, in point of fact, the only question which arises here is whether, upon the death of a person entitled in remainder expectant upon the determination of a particular estate, created under a disposition made long anterior to the *Succession Duty Act*, and which death of a person so entitled takes place long anterior to the Act, there was any succession in that person. I take leave to say that that which has been the ground of contention on the part of the Crown is a great mistake with respect to the meaning of the 2nd section, and that no succession in the sense of being liable to duty vested in that person. It was a mistake therefore to make Mrs. *Dawkins*' estate liable to a duty of one per cent.

Another thing which is observable upon these proceedings, and which may be laid down, is this, that whenever in the devolution of a succession to personal estate, it either vests in the original owner or passes to a derivative owner, who afterwards bequeaths it, and the estate becomes liable to legacy duty, the subject matter of the succession, that is, the property which would have been the subject of succession, falls into the jaws of the *Legacy Duty Act*, and is by reason of that event exempted altogether from being affected by the *Succession Duty Act*. There was here no succession duty payable by Mrs. *Dawkins*. And, farther, Mrs. *Dawkins* being entitled in interest, though not in possession, to the property now alleged to be the subject of duty, bequeathed that property under her will, and the property so bequeathed became liable to

legacy duty, and has borne that legacy duty. Therefore, according to the very terms of the 18th section, the property being acquired by virtue of the one original title, that is, the right which the testatrix had under the original settlement, and which is transmitted by the will, and having borne its burthen under the *Legacy Duty Act*, is exempted altogether, as common sense and justice would demand, from the taxation imposed by the operation of the *Succession Duty Act*. It has borne its proper burthen and ought to be subject to no farther burthen.

I therefore concur entirely in the judgment which it has been proposed to your Lordships to pronounce, namely, that this appeal be dismissed with costs.

LORD COLONSAY concurred.

Decree affirmed, and appeal dismissed, with costs.

Lords' Journals, 28th July, 1871.

Solicitor for the Appellant: *The Solicitor for Inland Revenue.*

Solicitors for the Respondents: *Walters, Young, Walters, & Deverell.*

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GEORGE MORGAN AND OTHERS . . PLAINTIFFS IN ERROR;

June 27, 30;

AND

July 28.

HENRY CRAWSHAY DEFENDANT IN ERROR.

Coal Mines—Iron Mines—Poor-rate.

Iron mines and all other mines, except coal mines, are, under the Statute of *Elizabeth*, exempt from liability to the poor-rate. The statute mentioning mines mentions coal mines only, and a long course of decision has established that the rule *expressio unius est exclusio alterius* applies to the enactment.

Per LORD CHELMSFORD :—If the question was now to be considered for the first time, though it might be difficult to satisfy the mind why the statute mentions coal mines alone as the subjects of taxation, the ordinary rules for the construction of statutes would have the effect of excluding any implied intention on the part of the Legislature beyond or different from what it has expressed.

Semble, that galees under the Crown of mines in the *Forest of Dean* are occupiers, and as such are liable (where the mine is by law the subject of rating) to be rated as occupiers to the relief of the poor of the parish.

Per LORD CHELMSFORD :—The interest of a galee is, under the 24 & 25 Vict. c. 40, of the nature of real estate, and is capable of occupation.

THIS was a proceeding in Error against a judgment of the Court of Exchequer Chamber, which had affirmed a previous judgment of the Court of Queen's Bench (1).

The Plaintiffs in Error were the overseers of the poor of the township of *East Dean*, in the county of *Gloucester*. The Defendant in Error was interested in certain iron mines in the township. What was the legal character of his interest therein was one of the questions presented for consideration. The other was, whether iron mines were rateable to the relief of the poor under the 43 Eliz. c. 2, s. 1. The forest of *East Dean* is the property of the Crown, and the Commissioners appointed to manage that property have, under the 1 & 2 Vict. c. 43, the power to make grants for the working of the mines within the limits of the forest, and to fix the rent or royalty payable. But the galeage rent was liable to be changed every twenty-one years. These powers were more fully defined in the Act, 24 & 25 Vict. c. 40.

Mr. *Crawshay* was the "galee" (2) of certain iron mines within

(1) Law Rep. 4 Q. B. 581.

which, though now frequently used (especially in *Ireland*) as a mere synonym

(2) This word is derived from Gale,

the forest, and the character of his holding is thus described in the two Acts. By 1 & 2 Vict. c. 43, s. 14, any "male person born or abiding within the hundred of *St. Briavels*, of the age of twenty-one years and upwards, who shall have worked a year and a day in a coal or iron mine within the said hundred, shall be deemed a free miner," &c. To such a person the keeper of the gawle, or gaveller, was empowered to grant a gale of the mines. And the 24 & 25 Vict. c. 40, s. 1, thus described the condition of a galee: "The grant of a gale of coal or iron, or of a stone quarry, shall be deemed to have conferred, and shall confer on the galee, his heirs and assigns, a licence to work the mine, vein, or pit therein comprised, and such grant shall be deemed to have conferred on the grantee, his heirs and assigns, an interest of the nature of real estate, such licence, nevertheless, being conditional on the payment of all the rents, royalties, and other dues from time to time payable to Her Majesty, her heirs and successors, in respect thereof, and the observance and performance of the several enactments, provisions, rules, and regulations for the time being in force for the proper opening, working, use, and management of the gale."

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Per 215

The 2nd section declared that "every lease of stone, clay or sand" was in like manner to be conditional on the payment of the rents and royalties, and performance of the conditions, &c.

The 4th section declared that "the obligation to pay the rent, royalty, and other dues from time to time becoming payable," and to observe the regulations, &c., "shall be a personal obligation on the person for the time being in the actual possession or receipt of the proceeds of the gale, whether as owner thereof for an estate of freehold, or as lessee, or under-lessee, or otherwise howsoever;" but such liability was to cease with the cesser of the possession.

During the continuance of the gale the galee has the right to take all the ore he can raise from the mines comprised in his gale.

In October, 1866, a rate was made for the relief of the poor of

for rent, had originally the meaning of tribute, or service. It was the Saxon *ḡapel*, hence *Gavelherte*, or *Gavelerth*,

the duty of ploughing so much land for the lord, and *Gavelrep*, the duty of reaping for him.

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the township of *East Dean*, and the overseers considering Mr. *Crawshay*, in his character of holder of a gale in the forest, to be a person liable to be rated as an occupier of lands within the meaning of the 43 Eliz. (1), inserted his name in the rate in respect of a rateable value of £2243 16s., and afterwards levied a distress to enforce payment of the rate. Mr. *Crawshay* thereon brought his action as for an illegal distress. A case was stated without pleadings, and the Court of Queen's Bench and the Court of Exchequer Chamber successively gave judgment against the overseers. This proceeding in Error was then brought.

The Judges were summoned, and Mr. Baron *Martin*, Mr. Justice *Byles*, Mr. Justice *Blackburn*, Mr. Justice *M. Smith*, Mr. Baron *Cleasby*, and Mr. Justice *Hannen* attended.

Sir *R. Palmer*, Q.C., and Mr. *Henry James*, Q.C. (Mr. *Anstie* was with them), for the Plaintiffs in Error:—

The first question here is whether iron mines are rateable under the provisions of the Statute of *Elizabeth* (1); and the second, if they are so, whether the Respondent in this case is rateable as an occupier.

As to the first of these questions, the claim of exemption is that the statute only mentions coal mines, which it is said shews that mines were in the contemplation of the Legislature, but that it deemed no other mines except coal mines ought to be rated, and that this construction must be put upon the Act in accordance with the principle *expressio unius est exclusio alterius*. But it is doubtful if this opinion is warranted by the authorities. It is true that in *The Lead Smelting Company v. Richardson* (2), which was the first case where the rateability of mines, not coal mines, was discussed, Lord *Mansfield* adopted this principle as the ground of his decision, observing that, at the time of the statute, "there were other mines in this country." But then he goes on to shew why he considered these other mines to have been excluded from the operation of the

(1) The 43 Eliz. c. 2, s. 1, enacts that the "churchwardens and overseers shall raise by taxation of every inhabitant, &c., and of every occupier of lands, houses, coal mines, or saleable

underwoods in the parish, &c. . . . according to the ability of the same parish."

(2) 3 Burr. 1341.

statute, and refers that exclusion to their nature and condition, the way in which they were worked, and the risk attending the working of them. Having referred to what he supposes may have been a sufficient reason to except them out of the Act, he says: "As there *may be* a reason for the strict letter of the statute, and none appears for extending it beyond the letter, we have no ground for giving it that extended construction." The decision, therefore, of that case depended on the idea of what had been the motives of the Legislature, and not upon the simple application of the rule of *expressio unius*. Now it is clear that the reasons which at that time influenced the mind of the Court did not, or do not any longer, exist, for all such mines may be worked with at least as little risk or difficulty, and with quite as much certainty of profit, as coal mines. The reasons given by Lord *Mansfield* have often since been remarked on, and not always with approval, by subsequent Judges. In *Rex v. Cunningham* (1), where coal and iron mines had been included in one rate, the rate was quashed, Lord *Ellenborough* assuming that iron mines could not be rated, and quashing the rate because being bad as to part it could not be sustained. But he gave no opinion in favour of the assumed statutory ground of exemption. In *Rex v. Sedgley* (2), Lord *Tenterden* having said that he took it to be now established that the expression of coal mines in the Statute of *Elizabeth* had the effect of excluding all other mines, went on to observe on the reasons given by the Judges in preceding cases, and said (3): "I must confess that much that has been said is by no means satisfactory to my own mind, and I feel great difficulty in endeavouring to reconcile the several *dicta* with each other;" yet because the rule had been established for a long time he thought it must be adhered to. The disinclination which he felt to overrule the decisions of his predecessors in his own Court is, of course, not applicable to this House, where the principles of those decisions can be authoritatively considered. Again, in *Rex v. Brettell* (4) where clay pits were, from the manner of working them, held to be clay mines, and therefore not rateable, the Court adhered to the precedent afforded by *Rex v. Sedgley*. So far, therefore, the rule

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(1) 5 East, 478.

(2) 2 B. & Ad. 65.

(3) 2 B. & Ad. 73.

(4) 3 B. & Ad. 424.

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appeared to have been acted on, but with a clear expression, in one case at least, of doubt as to the correctness of the reasoning by which that rule was established.

Then comes another class of cases in which distinctions were taken that had the effect of getting rid of the strict application of the rule as stated in *The Lead Smelting Company v. Richardson* (1). The first of these cases was that of *Rowls v. Gells* (2), where the lessee (under the Crown) of lead mines having sub-leased them to certain adventurers, reserving to himself a part of the profit from the ores obtained by the adventurers, and obtained by them without risk to himself, was held rateable in respect to those profits. There Lord *Mansfield* himself expressly said that the occupier was liable in respect of a profit arising from the land—that lead mines were not within the Statute of *Elizabeth*, for that they were uncertain and might be unsuccessful, that therefore the tax could not be levied on the adventurers, but that it was rightly levied upon the person who, in case the mines proved of value, received a profit on that value, which he obtained without risk. In *Rex v. The Bishop of Rochester* (3) landlords who had leased mines on condition of receiving a certain rent and a certain proportion of the ore which should be raised, were held not rateable in respect of the rent, whatever might be their liability on their portion of the ore raised, should any ore be raised. In *Rex v. St. Agnes* (4), persons entitled to certain portions of the tin raised by the adventurers, to whom they had leased the mines, were held to be rateable. In *Rex v. The Baptist Mill Company* (5), the lessees (under the lord of the manor) of lot, toll, and free share of all calamine raised within the manor were held liable to be rated to the poor as occupiers of land, though none of them was resident in the parish. Lord *Ellenborough* there said: “If these lessees of lot, toll, and free share are rateable at all, they must be rateable for property falling under the description of land;” and he held that they were so rateable, though he intimated a doubt whether they could have maintained trespass *quare clausum fregit* for the calamine stone. He looked upon it as “a demise of a specific portion

(1) 3 Burr. 1341.

(2) Cowp. 451.

(3) 12 East, 353.

(4) 3 T. R. 480.

(5) 1 M. & S. 612.

of the produce of land, or, in other words, land itself, free from risk or uncertainty." Surely that view of the matter establishes that the iron ore which this Respondent is entitled to take, is, in like manner, "a portion of the produce of the land, or, in other words, land itself." If so, it is rateable within the very words of the statute. And he adopted this view because, as he said, "otherwise we might have been pressed with the question whether the naming coal mines in the statute was, according to the rule *Expressio unius est exclusio alterius*, to all intents an exclusion of other mines, or was only put for example, as the naming of a class in the statute *Circumspecté agatis*; for certainly the Judges who have held it to amount to the exclusion of other mines have generally coupled it with the reason that other mines are subject to risk. Now here the portion of calamine is divested of risk—it is the clear profit to which the lord is entitled, independent of any contingency." Nothing could more clearly shew that his Lordship very reluctantly yielded to the argument of *expressio unius*, that he thought it was not satisfactory, that he sought for the ground of decision against rateability in the risk and uncertainty of obtaining the produce of the mines, and that where risk and uncertainty did not exist he held the produce of the mines rateable. In *Rex v. Pomfret* (1) the Court adopted the principle laid down in *Rex v. The Bishop of Rochester* (2), and finding there that the reservation of a portion of the lead was not a reservation of part of the mineral itself, but of a manufactured article which was in the nature of rent, held that the Appellants were not rateable. But, except for the peculiar nature of the reservation, the rating would have been maintained. And even that ground of exemption was not adopted in *Rex v. Todd* (3). In *Rex v. St. Austell* (4), where there was a render of all the tin to be raised, though it was first to be put into a merchantable condition, Lord Chief Justice Abbott did not act on *Rex v. The Bishop of Rochester*, nor on *Rex v. Pomfret*, but, taking distinctions between the latter and the case then before the Court, held that *Rex v. The Baptist Mill Company* (5) and *Rowls v. Gells* (6) were

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(1) 5 M. & S. 139.

(2) 12 East, 353.

(3) 12 A d. & El. 816.

(4) 5 B. & Ald. 693.

(5) 1 M. & S. 612.

(6) Cowp. 451.

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the cases properly applicable, and sustained the rate. Mr. Justice *Bayley* there, too, expressed his opinion that the owner of the soil was, in respect of this reservation, to be treated as an occupier of the land, and so was rateable. In *Rea v. Tre-mayne* (1) the owner of the soil was to receive a rent, the amount of which was calculated on the quantity of ore raised, but he was not to receive any part of the ore itself—he, therefore, was only entitled to a rent, and so was not rateable. In *Crease v. Sawle* (2), where the grantee of the Duke of Cornwall had leased to adventurers, reserving the toll receivable by the Duke, which was a certain quantity of the ore raised, he was held to be rateable in respect thereof. These various and not very consistent decisions shew what difficulty the Courts had felt from the doctrine of non-rateability as qualified, and yet upheld, by distinctions touching the nature of the interest reserved to the owner of the mine. It could hardly be said that it was decided that no mines but coal mines were liable to rate, for here were many instances in which other mines had been in fact subjected to rate on account of the interest reserved to the owner, or granted away by him to lessees.

Then as to the second branch of the case, namely, whether this Respondent is or is not an occupier. If he is, he is liable. The case of *Jones v. The Mersey Dock Trustees* (3), laid down the principle that “all property capable of beneficial occupation, and which, if let to a tenant, would be capable of producing rent, is liable to be rated.” Here there is property capable of beneficial occupation, and in fact it is beneficially occupied. In *Roads v. Trumpington* (4) it had been agreed that *A.* should enter on *B.*’s land and dig for coprolites in a specified manner, fence the excavations, finish the work by a certain time, re-instate the land, and then yield and deliver up the land to *B.* Though there were no words expressly giving to *A.* the right to the exclusive occupation of the land, he was held to possess that right, and so he was treated as the occupier of the land, and as such liable to be rated. In giving judgment in that case Mr. Justice *Blackburn* said: “The doctrine that the produce of mines can be rated although mines cannot, is very peculiar, and rests upon authority alone.” Again,

(1) 4 B. & Ad. 162.

(2) 2 Q. B. 862.

(3) 11 H. L. C. 443. *11 H. L. C. 746*

(4) Law Rep. 6 Q. B. 366.

on the question of rateability on account of occupation, there was the case of *The Metropolitan Board of Works v. West Ham* (1), where the board of works had constructed sewers on an embankment, and erected a pumping station and other works, and there, though the board derived no pecuniary advantages from these works, which were maintained by rates levied under statutes, and it was held that there could be no beneficial occupation of the sewers, yet it was also held that there was a beneficial occupation of the other works, which were held to be rateable at the value at which the same would let to a tenant from year to year.

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Mr. *Manisty*, Q.C., and Mr. *H. Matthews*, Q.C., for the Defendants in Error:—

There are two questions here: first, whether iron mines are subject to rating for the relief of the poor; and, secondly, whether a galee of these particular mines is an occupier so as to be liable to rates. If the first question is decided in the negative the second will not arise.

The decisions on this subject are not conflicting but uniform, and the practice has been so for a period of above 200 years, during which time coal mines alone have been rated. The Legislature has expressed itself in a certain manner, and from the first time that the question came before the Courts they have held that coal mines are alone subject to the poor-rate. It is impossible to know, and vain to inquire, why coal mines alone have been mentioned in the statute, and whether the reasons supposed to have influenced the Legislature in this matter are satisfactory or not; the fact is, that all other mines have been left out of the statute, and cannot be made the subject of taxation by the Courts putting a fanciful construction upon it. [LORD CHELMSFORD:—Suppose the owner of a limestone mine worked it himself, would he not be liable as a person in occupation of land from which he derived a profit?] It is needless to consider such a case, for here the party rated is not the occupier of the mine, but merely the worker of it. [LORD CHELMSFORD:—But is not the mine land—and if so, is not he who gets a profit for working it, an occupier of land, so as to be rate-

(1) Law Rep. 6 Q. B. 193.

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able in respect of the profit?] A mine cannot be constructively held to be land, for the statute has expressly distinguished between land and mines, and has limited to one sort of mine the liability to rate. That cannot be controverted without overruling all the cases that have been decided on the point.

The case of *Jones v. The Mersey Docks* (1) does not decide the present; first, because there is not here an occupation, and, next, because of the words of the statute, and the many cases in which they have received an authoritative construction declaring that coal mines are alone rateable. As to occupation, the 23rd and 24th sections of the 1 & 2 Vict. c. 43, shew exactly what is the character of a galee, and establish that he is not an occupier within the proper meaning of that term. First, he must be a "free miner" within the previous sections of the statute, then he must be registered as such—being a free miner, and being registered, he may receive from the gaveller leave to open mines; but if he has become a free miner only by reason of working a year and a day, he is not to have leave to open mines, but only to receive a lease of a quarry, and all the persons entitled to work are to do so under the regulations prescribed by the Commissioners. All these things shew that a galee is not properly an occupier, but only a licensed workman, in which character he is not liable to be rated. There is a marked distinction, therefore, between the case of *Roads v. Trumpington* (2) and the present, for there the person who was to dig for coprolites was to have the exclusive use of the land for that purpose, and at the end of his term "to yield up" the land to the owner, a form of expression which clearly shews that while he was using the land he was in exclusive possession of it. Here there is nothing of the sort, nothing but a license (under regulations imposed by the Commissioners) to take the iron ore, but there is no occupation of the land. In *Rex v. Pomfret* (3) Lord *Ellenborough* said that who were the owners or lessees of mines depended altogether on the customs of the place. On that principle the use to which young fir trees were put, led the Court, in *Rex v. Ferrybridge* (4), to determine that they were not saleable underwoods. The same principle was acted on in *Fitzhardinge (Lord) v.*

(1) 11 H. L. C. 443. *11 H. L. C. 443* (3) 5 M. & S. 139.

(2) Law Rep. 6 Q. B. 56. (4) 1 B. & Cr. 375.

Pritchett (1). Tried by that test it is clear that the customs of the place, the customs of *Dean Forest*, as created and regulated by the statutes, did not confer on this Respondent the character of an occupier. The only ground in *Rex v. St. Austell* (2) for holding the owner of mines to be rateable was, that his reservation of one eighth share of the tin ore raised operated as an exception out of the demise. Lord Chief Justice *Abbott* expressly describes the owner as by that reservation making himself "an occupier of the land, and deriving a profit in respect of that occupation." Here the Respondent is in no sense an occupier of the land, though, even if he was, his occupation would be of property which by statute was not liable to be rated.

Mr. *H. James* replied.

LORD CHELMSFORD moved that the following question be put to the Judges:—

"Whether the Respondent being, in the manner stated in the special case, a galee of certain mines of iron ore in the township of *East Dean*, is or is not liable to be rated to the relief of the poor?"

The Judges requested time to consider the question.

Mr. BARON MARTIN delivered the opinion of the Judges:—

In answer to the question proposed to the Judges by your Lordships, I have to state their unanimous opinion that the Defendant in Error being galee of certain mines of iron ore in the township of *East Dean*, in the manner stated in the special case, is not liable to be rated to the relief of the poor.

Your Lordships' question depends upon the construction of the 1st section of the original *Poor Law Act*, 43 Eliz. c. 2. This Act was passed in the year 1601, and the point now in dispute, viz., whether any other mines except coal mines are rateable to poor-rate, has been the subject of very many decisions reported in the books, and from the time of its enactment, 270 years ago, to the present time, the practice has been uniform, that no mines except coal mines have ever been rated, and although the reported cases

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(1) Law Rep. 2 Q. B. 135; 8 B. & S. 216.

(2) 5 B. & Ald. 693.

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do not commence so early, yet so far as they are known, there has been one unvariable, uniform, and constant flow of decisions all one way, that except coal mines no other mines are rateable.

Very many cases were cited on the argument. I mean to refer to three only. The first is the case of *The Governor and Company for Smelting Lead v. Richardson* (1). This was in Lord Mansfield's time, in the year 1762. It was twice argued, and by the direction of the Court inquiry was made as to what mines were in fact rated, and the answer seems to have been that none other than coal mines had been. In the result Lord Mansfield and the other Judges delivered most decided judgments that no other mines except coal mines were rateable.

The next case to which I desire to refer is *Rex v. The Inhabitants of Sedgley* (2). This case was decided in 1831. It was argued at great length, and Lord Tenterden delivered the judgment of the Court. He stated it to be established law that the expression of "coal mines" in the statute had the effect of excluding all other mines. He expressed himself as by no means satisfied in his own mind with that construction, but he said that the rule had been established and acted upon for so long a time that it ought to be adhered to, unless it could be positively said that it was wrong, and productive of inconvenience. I need not tell your Lordships that no inconvenience was pointed out in the argument before you; which was rather directed against some reasons which former Judges had given in some of the old cases. This case is important, because it shews that Lord Tenterden and the Court of King's Bench forty years ago thought that if there had been error in the construction of the statute, it was too late to remedy it.

The next case, the third and last case to which I propose to refer, is *Crease v. Sawle*, in the Exchequer Chamber (3). The question there was not the same as the present, although it arose upon the same section of the Act as to the poor; but the late Chief Justice Tindal, in delivering the judgment of the Court, said: "Important as it is in all branches of the law to abide by previous decisions, in none is it more important than in this. The rules which apply to the rateability of property are everywhere daily

(1) 3 Burr. 1341.

(2) 2 B. & Ad. 65.

(3) 2 Q. B. 862.

acted upon in the management of parochial affairs, and materially affect the value of estates."

This case was decided in 1842, and the Court of Exchequer Chamber acted in conformity with the opinion of the Court of King's Bench in 1831.

The question depends upon the construction of language used considerably more than two centuries ago. One uniform construction has been put upon it ever since, and no doubt very many persons have entered into contracts, and are now in the occupation of property, in the belief that what has been held to be law so long shall continue to be so until altered by the Legislature. If we were to set up our own opinions against such a long-continued contemporaneous exposition, where are we to stop? If we go back to give a new construction to a writing nearly 300 years old, why may we not go back 500 years and give a new construction to the statute "*Quia Emptores*" or "*De Donis*," or the *Statute of Uses*, because we do not feel satisfied that the language in which they are expressed properly bears the meaning attributed to it by Lord *Coke* and the other old authorities in the law.

In construing old statutes it has been usual to pay great regard to the construction put upon them by the Judges who lived at or soon after the time when they were made, because they were best able to judge of the intention of the makers at the time. The uniform practice for 170 years after the Act of Elizabeth passed, not to rate any mines but coal mines, shews what the contemporaneous exposition of the Act was. "*Cotemporanea expositio est fortissima in lege*" is a favourite maxim of *Coke's* as applied to statutes: See 2nd Institute, 11 and 136; 4th Institute, 138.

It is almost superfluous to add that at the time when the Act was passed other mines were known and worked as well as coal mines. *Coke* speaks of a grant to the Duke of *Bedford*, when Regent of *France*, of all mines of gold and silver in *England*, rendering a certain portion to the King and a certain portion to the owner of the soil: 4th Institute, 360.

The reason for excluding all mines but coal mines from the Act may possibly have been that other mines were regarded rather as in the nature of manufactures or commercial enterprises carried on by means of the ores than as things in their natural state capable

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of occupation ; and if this was wrong, and so wrong as to demand a remedy, it may be redressed by the Legislature in such manner and with such regulations as to rating as may be deemed just.

But we do not consider ourselves at liberty now to enter into a critical examination of the words of the Act. We think its meaning is absolutely and conclusively settled by authority.

The decision of your Lordships in *Jones v. Mersey Docks* (1) in no way conflicts with this principle, for there the decisions were conflicting.

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LORD CHELMSFORD :—

My Lords, the questions raised by this proceeding in Error are, whether mines of iron ore are rateable to the relief of the poor under the statute of the 43 Eliz. c. 2 ; and if they are, whether galees of such mines are liable to be rated as occupiers ?

It was argued upon this second question for the Defendant in Error that the galees of mines in the *Forest of Dean* are mere licensees under the Crown, and not occupiers. If it was necessary to determine this question, I should have some difficulty in adopting the view of the interest of the galee presented to your Lordships in the argument on behalf of the Defendant in Error.

It appears that at the time of the passing of the 24 & 25 Vict. c. 40, some doubts had been entertained as to the estate and interest conferred by grants of gales of coal and iron within the *Forest of Dean* ; and for quieting these doubts the 1st section of that Act enacts and declares :—[His Lordship read it (2)]. The interest of the galee in the mines, therefore, is not a mere license to work them, but of the nature of real estate, and so capable of occupation.

It was admitted in the course of the argument that the galees of coal mines in the *Forest of Dean*, which are granted in the same manner as the iron mines, have always been rated to the relief of the poor as occupiers of the mines. But whatever conclusion may be formed upon this point, your Lordships will probably agree with me in the opinion that iron and all other mines, except coal mines, are exempt from liability to poor-rate under the Statute of *Elizabeth*.

(1) 11 H. L. C. 443. *Wm. H. S.* (2) See *ante*, p. 305.

There has been a common consent of all the Judges to whom the question has been submitted as to the non-rateability of the Defendant in Error. The Court of Queen's Bench, upon the special case stated by consent, gave judgment *pro formâ* for the Defendant in Error without argument. The Court of Exchequer Chamber consisted of six Judges, who, after a short argument for the now Plaintiff in Error, and without calling upon the other side, briefly stated that they "thought it wise (in the language of Chief Justice *Tindal* in *Crease v. Sawle* (1), to abide by the construction which numerous decisions have given to the words of the statute, and which has been for a long time acted upon;" "and they therefore held the occupier of an iron mine not to be rateable, coal mines alone being mentioned in the statute."

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The six learned Judges whose assistance your Lordships desired, in answer to the question put to them, have now delivered their unanimous opinion that the Defendant in Error was not liable to be rated to the relief of the poor.

After these uniform judicial decisions, after more than two centuries and a half of practical acquiescence in the construction of the Statute of *Elizabeth*, there not being a single instance of any other mines than coal mines having been rated to the relief of the poor during this long period, unless it clearly appeared that the decisions had commenced and had been continued in error, your Lordships would be very reluctant to disturb what has invariably been regarded as the settled law upon the subject. But the highest point to which the argument against the construction put upon the statute can be carried is only to the suggestion of a doubt. It may be difficult to explain why coal mines alone should have been specified in the Statute of *Elizabeth*, when other mines existed and were profitable to the workers. The reasons assigned by Lord *Mansfield* and the other Judges in the case of *The Lead Company v. Richardson* (2), for the statute having confined the liability of taxation for the relief of the poor to one species of mines, may not be satisfactory; but the statute must speak for itself; and when, in particularizing the various descriptions of property from which the money for the relief of the poor is to be raised, it comes to mines, and mentions coal mines only, it must

(1) 2 Q. B. 886.

(2) 3 Burr. 1341.

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be taken to mean that these alone shall be taxable. The well-known rule of construction *expressio unius est exclusio alterius* is here applicable. And the intention to exclude other mines from the operation of the statute which it implies is strongly fortified by contemporaneous exposition in the uniform practice which has prevailed from the passing of the statute to the present time.

Nor are there wanting decisions upon the very point. The first which is reported is that which has been already mentioned, *The Lead Company v. Richardson* (1), which was decided more than a century ago, namely, in the year 1762. That was a case as to the rateability of lead mines, and the Court caused inquiry to be made with respect to the rating of other mines besides coal mines, and learnt that at that time (160 years after the passing of the Statute of *Elizabeth*) lead mines throughout *England* and tin mines in *Cornwall* had never been rated. The Court of King's Bench held that the Plaintiffs, lessees of lead mines, who paid no rent, but only a certain part of the ore raised, were not liable in respect thereof to be rated to the relief of the poor.

The cases of *Crease v. Sawle* (2), and *Reg. v. Todd and Others* (3), cited in the argument, are not opposed to that decision. It was not held in either of these cases that the tin mine in the one case, or the lead mine in the other, was rateable, but that the lessors receiving by way of render a certain proportion of the ore in an unmanufactured state, were rateable to the relief of the poor in respect to the ore delivered to them.

The case of *Rex v. The Inhabitants of Sedgley* (4), was decided in the year 1831; all the cases upon the subject of the rateability of mines, from that of *The Lead Company v. Richardson* (1) downwards, were cited there in the course of the argument; and it was held that the express mention of coal mines in the Statute of *Elizabeth* was a virtual exclusion of all other mines, and consequently that other mines were not rateable to the relief of the poor. Lord *Tenterden*, in adverting to the *dicta* and opinions of Judges before whom questions of this nature had been brought, said: "I must confess that much that has been thus said is by no means satisfactory to my own mind, and that I feel great difficulty in an

(1) 3 Burr. 1341.

(2) 2 Q. B. 862.

[(3) 12 Ad. & El. 816.

(4) 2 B. & Ad. 65.

endeavour to reconcile the several *dicta* with each other. But it is not necessary to do this. The rule of construction has been established and acted upon for a long time and ought to be adhered to, unless we could say positively that it is wrong and productive of inconvenience." After this long-continued course of *dicta* and decisions, unless your Lordships entertained the strongest opinion that the first decision on the subject was erroneous, and all the cases that followed were merely echoes of the first, you would be most unwilling to pronounce a condemnation of the judgments which have been given, and of the practice which has uniformly prevailed for so long a period, for the exemption of all other mines except coal mines from liability to be rated for the relief of the poor. But if the question had been one which had to be considered for the first time, although I am unable to satisfy my mind why the statute mentions coal mines alone as subjects of taxation, I should, in acting upon the ordinary rules for the construction of statutes, have been unable to gather an implied intention on the part of the Legislature beyond what it has expressed. If it was intended that all mines should be taxable towards the objects of the statute, it is not easy to explain why this intention was not made plain, by simply expressing it; or if, with this existing intention, coal mines for some reason or other were to be specially mentioned, it could hardly fail to have occurred to the Legislature to bring the rest of the mines expressly within the liability to taxation by the words "coal and other mines."

I submit to your Lordships that the judgment of the Court of Exchequer ought to be affirmed.

LORD WESTBURY:—

My Lords, it is not necessary in the present case to examine with any accuracy what is the nature of the interest of a galee in mines of iron ore; because, supposing it be regarded as a tenement, and not merely as an incorporeal right, I should still arrive at the conclusion that we must bow to the uniform interpretation which has been put upon the Statute of *Elizabeth*, and must not attempt to disturb the exposition which it has received.

With regard to a great deal of the reasoning in former and in later cases, in support of that interpretation of the statute, if that

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question could now be entered into, I should be very much inclined to quarrel with it, but it is unnecessary to enter into that, because if we find a uniform interpretation of a statute upon a question materially affecting property, and perpetually recurring, and which has been adhered to without interruption, it would be impossible for us to introduce the precedent of disregarding that interpretation. Disagreeing with it would thereby be shaking rights and titles which have been founded through so many years upon the conviction that that interpretation is the legal and proper one, and is one which will not be departed from. My Lords, I can only say that the decision which your Lordships arrived at some four or five years ago in *Jones v. The Mersey Docks Company* (1) is not at all at variance with the decision which you are now disposed to come to, because there you had a great variety of conflicting decisions, the scale descending at one time and ascending at another; and in that state of conflicting determinations you were obliged to come to some settled opinion upon the proper interpretation of the statute. That does not appear to be so in this case. Here you have everything upon which the people of this country are disposed to rely in the acquisition of land and in dealings with land, namely, the uniform declaration of the law for more than two centuries. I hope, therefore, that your Lordships will concur in the conclusion that, upon that ground alone, this appeal ought to be dismissed.

My Lords, I may say that if, in this state of circumstances, the law requires to be altered, that alteration must be effected by legislation, and ought not to be brought about by reversing a long course of decisions and of settled practice by a decision of your Lordships' House.

LORD COLONSAY entirely concurred.

Judgment affirmed.

Lords' Journals, 28th July, 1871.

Attorneys for Plaintiffs in Error: *Rogerson & Ford*.

Attorneys for Defendant in Error: *Jones & Starling*.

(1) 11 H. L. C. 443. *11 June 25746*

THOMAS F. SHAW APPELLANT;

AND

SIR W. FOSTER, BART., AND A. G. POOLEY . RESPONDENTS.

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March 1, 14.

Vendor and Purchaser—Equitable Mortgage—Notice.

A notice to the vendor of an estate that the vendee has deposited the contract with a third party, *A.*, and has entered into an agreement with *A.* to make to *A.* "a valid assignment" of the contract, does not bind the vendor to make inquiries whether the agreement between the vendee and *A.* has been carried into effect; nor will it compel the vendor to refuse to execute the conveyance to the vendee, who, upon the payment of the purchase-money, demands the conveyance, nor even excuse the vendor for making such a refusal.

The persons who claim to have the benefit of the assignment must give distinct notice to the vendor of their claim, and of their readiness to put themselves in ~~the~~ position for the completion of the contract.

F. entered into a contract with *P.* to sell him some leasehold property. *P.* paid part of the purchase-money, and obtained from *F.* a lease of the premises for a short term of years, in favour of a nominee of *P.* *P.* had dealings with bankers, to whom he became much indebted. Being called on to give the bankers some security, he handed to them the title deeds of a freehold estate, which he charged with the debt, and at the same time he deposited with them his contract for the purchase of the leasehold property. He accompanied this deposit with a written memorandum, in which he agreed to make to the bankers "a valid assignment of my contract with *F.* for the purchase of" the leasehold premises, "by way of mortgage for farther securing," &c. The bankers, by their solicitor, some time afterwards gave to *F.* notice (in the above words) of this agreement, and the solicitor's letter called it "a charge by *P.* on his purchase." *F.* acknowledged the receipt of this notice. He heard nothing more of the matter. *P.* did not complete his purchase at the stipulated time, but did so afterwards, and then *F.*, according to the terms of the original contract, executed to him a conveyance of the leasehold premises, without any notice being taken in the conveyance of the claims of the bankers:—

Held, that the rule of Equity that a vendor of an estate is, after the making of the contract of sale, a trustee for the purchaser, did not apply to this case, and that *F.* was in no way liable to the bankers.

Per LORD CAIRNS:—A deposit of title-deeds, as security for a debt, will, without more, create in Equity a charge upon the property; but where it is accompanied by a written document, the terms of that document must be referred to in order to ascertain the exact nature of the charge.

THIS was an appeal against a decision of Lord Chancellor *Hatherley*, which had reversed an order of the Master of the Rolls

The Respondent *Foster*, who was mortgagee in possession of the *Alhambra Palace, Leicester Square*, held under two leases for sixty years each, at ground rents amounting to £910, had, on the 30th

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6CLD 47
9CLD 58
17CLD 42
6CLD 65
7CLD 79
18CLD 81
7CLD 86
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of September, 1864, contracted with the other Respondent, *Pooley*, to sell him the premises. The memorandum of agreement for sale was in the following terms:—

“I *Alexander Gopsell Pooley*, of &c., have this day purchased, by private contract, the property described in the annexed particulars of sale, including fixtures as per schedule, at the sum of £22,500. I have paid the sum of £2000 as a deposit, and in part payment of the purchase-money. And I agree to bind myself, my heirs, executors, and administrators, to pay the balance of the said purchase-money, and complete the purchase in all other respects agreeably to the conditions of sale hereunto annexed, save as far as the same are inconsistent with a sale by private contract, or with the provisions of this memorandum. I agree to take possession of the premises within twenty-one days from the date hereof, and to pay to the vendor the farther sum of £5500 on taking possession, and to pay the balance of the purchase-money as follows, viz.:—£5000 at the expiration of three calendar months from the date hereof, and the remaining £10,000 at the expiration of twelve calendar months from the date hereof. All outgoing to be cleared by the vendor up to Michaelmas, 1864, and by me from that time forward. The deeds to remain in the hands of the vendor until the purchase-money is completely paid, and then to be handed over to me, and a conveyance of the premises to be executed to me in the usual way. The vendor, at my request and cost, to join in granting any lease or leases I may desire during the time that the deeds remain in his hands.”

The £2000 were paid, and the payment duly acknowledged by *Foster*.

On the 23rd of November, 1864, *Pooley* paid to *Foster* the sum of £5500, and called on *Foster*, pursuant to the last article in the contract of sale, to execute a lease to his nominee, and a lease was accordingly executed to Mr. *Frederick Strange* for a term of twenty-one years from the 29th of September, 1864, at a rent of £2750 a year. The covenants in this lease were entered into by *Strange* with *Foster*. On the 19th of January, 1865, *Pooley* paid to *Foster* a farther sum of £5000, making up with his previous payments the sum of £12,500.

On the 23th of January, 1865, *Pooley* was indebted to the

Birmingham Banking Company in a very considerable sum of money, and to secure this debt accepted bills to the amount of £50,000 falling due at different dates from May, 1865, to May, 1866. As one of the securities for the payment of these bills, *Pooley* then deposited with the bank the memorandum of agreement between himself and *Foster* of the 30th of September, 1864, and at the same time executed a memorandum of deposit addressed to the trustees of the banking company. By this memorandum he charged some freehold property which he possessed in *Sussex*, and promised to execute a mortgage of the same upon request, and he also promised to execute a "valid assignment of my contract with Sir *W. Foster* for the purchase of the leasehold premises called the *Alhambra Palace*, &c., by way of mortgage for farther security, &c.," which mortgage was to be prepared by the solicitor for the banking company, and was to contain such "usual, reasonable, and fair covenants as he shall in his discretion think fit."

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On the 3rd of July, 1865, Mr. *Beaumont*, the solicitor for the banking company, sent to *Foster* the following notice, dated as of the preceding January, when the deposit of deeds was made:—

"38 *Bennett's Hill*, Jan. 28, 1865.

"I hereby, on behalf of the *Birmingham Banking Company* give you notice that by a deed-poll bearing even date herewith, under the hand and seal of *Alexander Gopsell Pooley*, and addressed to, &c., trustees of the said company, the said *A. G. Pooley* did agree with and to the said trustees that he would at any time thereafter, at their request and at his own cost, execute to them, &c., a valid assignment of his contract with you the undermentioned Sir *William Foster* for the purchase of the leasehold premises called the *Alhambra Palace*, *Leicester Square*, *Middlesex*, by way of mortgage for securing the principal and interest moneys therein expressed."

Beaumont on the same 3rd of July wrote a letter to *Foster* in which were inclosed two copies of the notice. The letter described this as "a notice, in duplicate, of a charge by Mr. *Pooley* on his purchase of the *Alhambra Palace* from you in favour of my clients the *Birmingham Banking Company*," and *Foster* was requested to accept service of the notice and to return one of the copies of the

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notice with a memorandum of acceptance of the service indorsed thereon. This request was, on the 5th of July, complied with.

The purchase was not completed at the stipulated time, the 30th of September, 1865, and *Foster's* solicitor wrote to *Pooley* on the subject threatening proceedings to compel specific performance. It appeared that *Pooley* had applied to the bankers to assist him with an advance to complete the purchase, but had been refused. Of this application and refusal *Foster* knew nothing. There had also been communications between *Pooley* and the bankers about the execution of a mortgage; but though a draft mortgage was prepared, none was executed. Of these circumstances likewise *Foster* knew nothing. On the 23rd of November, 1865, the purchase was completed. The sum of £10,000, the balance due (with a sum for interest), was paid, and *Foster* executed an assignment of the premises to *Pooley* in accordance with the terms of the contract. The assignment took no notice of any interest claimed by the banking company. *Pooley* shortly afterwards assigned the premises to a purchaser.

The bills of exchange given by *Pooley* to the bank had not been paid. On the 9th of April, 1866, *Beaumont* wrote to *Foster*, referred to his letter of the preceding 3rd July, 1865, inclosing the notice, and asked "what amount is now remaining due for the purchase-money." *Foster* wrote in answer that the whole had been paid and the purchase completed, *Beaumont* then, on the 19th of April, 1866, wrote to him as follows:—

"I am surprised to hear that you have received all the purchase-money, as I infer that the purchase has been completed; and as no notice has been given me prior to the completion (notwithstanding the notice I gave you of my client's mortgage), you are clearly accountable for any loss that my clients may possibly sustain in consequence of your omission."

Sir *W. Foster* answered that he was advised he was under no liability whatever to the banking company.

The banking company had been brought under liquidation, and on the 8th of May, 1867, the liquidator filed his bill against Sir *W. Foster* and *A. G. Pooley* setting forth the above facts, and (among other things) prayed that it might be declared that by

virtue of the said deposit and memorandum and the notice thereof given to *Foster*, the banking company had become entitled to an equitable charge for principal and interest on all the estate of *Pooley* in the premises, and all his rights and interests under the contract of the 30th of September, 1864, and that it might be declared that the assignment made by *Foster* to *Pooley* was a wrongful act and a breach of trust and duty on the part of *Foster*, and that he was liable to make good to the banking company the loss occasioned by such assignment; and for accounts, &c.

Foster and *Pooley* having put in answers, the case came on upon a motion for a decree, and on the 19th of January, 1870, the Master of Rolls made a decree granting the prayer of the bill. Upon a petition of rehearing and appeal, the Lord Chancellor, on the 10th of June, 1870, reversed the decree of the Master of the Rolls (1). This appeal was then brought.

The *Solicitor-General* (Sir G. Jessel), and Mr. *Southgate*, Q.C. (Mr. J. W. Chitty was with them), for the Appellant:—

The Master of the Rolls proceeded upon one of the best established rules of Equity, which must be disregarded if this judgment is to stand, namely, that from the time when a contract for the purchase of an estate has been entered into the vendor is a trustee of the estate for the purchaser: *Green v. Smith* (2); *Whittaker v. Whittaker* (3) (which, as far as this point is involved, was approved of by Lord Eldon in *Broome v. Monck* (4)); *Potter v. Potter* (5), and *Capel v. Girdler* (6). The whole question of the right of a purchaser under such a contract was considered in *Hadley v. Bank of Scotland* (7), and there Lord Justice Turner summed up the doctrine in these words (8): “I have always understood the rule of the Court to be, that if there is a clear valid contract for sale, the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by a *lis pendens*. I think this rule well founded in principle, for the property is, in Equity, transferred to the

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(1) Law Rep. 5 Ch. Ap. 604, *nom.*
McCreight v. Foster.

(2) 1 Atk. 572. See also *Pollexfen v. Moore*, 3 Atk. 273.

(3) 4 Bro. C. C. 31.

(4) 10 Ves. 597.

(5) 1 Ves. Sen. 437.

(6) 9 Ves. 509.

(7) 3 De G. J. & S. 63.

(8) Ibid. 70.

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purchaser by the contract, the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him." And in *Rose v. Watson* (1) not merely was the general doctrine acted on, but, there having been payments of parts of the purchase-money at different times, Lord *Westbury* said: "Every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does, in Equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate." In *Aberaman Ironworks v. Wickens* (2) Lord *Cairns* applied that doctrine by declaring the purchaser entitled to a lien "by way of incumbrance on a corresponding amount in value of the estate." Here a large part of the purchase-money had been paid, and the vendee was to a great extent in the condition of owner of the estate.

Pooley's interest in the property was, therefore, fixed and ascertained; and he had the power to transfer it. So far as his interest was concerned he did transfer it to the banking company; and the company's solicitor, by the notice which he gave to the Respondent, made the transfer for all purposes, as regarded the Respondent, complete. Upon that notice the Respondent became, in Equity, a trustee for the company, and was bound to give the company notice before proceeding to complete the transaction with *Pooley*, and before making to him an absolute assignment of the interest which the Respondent knew was beneficially vested in the company. The rights of an equitable mortgagee, under circumstances such as exist here, are clearly established in the case of *Whitworth v. Gaugain* (3).

Here, too, the general right of the vendee, such as already stated, was enforced by positive stipulation, for the vendor bound himself to grant a lease at the request of the vendee, and he did in fact grant one. It might have been, by the words of the contract, a lease for the whole term less only one day; it could be called for before the payment of all the purchase-money; and the vendor reserved to himself no other power than that of retaining the title deeds till the purchase-money should be completely paid.

(1) 10 H. L. C. 672. *10 June*
45297 (2) Law Rep. 4 Ch. Ap. 101-110.
 (3) 3 Hare, 416.

The common condition of forfeiture, if there was not compliance with all the terms of the conditions of sale, ceased to have any operation after the grant of the lease; the power of determining the contract was gone. The vendor had merely the legal estate, but not the entire ownership—he was a mere trustee for the vendee. His own power was gone, and he was therefore bound to perform what the vendee required. The vendee, having paid £12,500, was the real owner of the estate to the extent of that sum: *Rose v. Watson* (1); so that if he had been unable to complete the purchase, he would have had a clear charge or lien on the property for that amount. At that time he was indebted to the banking company, and with these rights absolutely vested in him he deposited with the company his contract of purchase, together with a deed-poll or memorandum, by which he agreed to assign his contract by way of mortgage in favour of the bank for the sum due. The bankers thereby became the equitable mortgagees of his interest, with an agreement on his part to give a complete mortgage. That agreement was not a mere promise to create a charge, it was an actual charge upon the estate. [LORD CAIRNS:—Where is the charge?] If a notice is given that *A.* who is really the owner of the property, will assign to *B.* on request, *B.* is entitled to be treated as if the formal assignment had been made, and notice that the request has been made is not a condition precedent. It is true that no deeds were here deposited, but the memorandum itself created a charge. The want of notice of the request cannot get rid of the charge; and here the charge was one known to all parties to be a charge for valuable consideration. *Daniels v. Davison* (2) shews that after a contract for the sale of an estate, if the vendor sells to another person for valuable consideration, he is accountable for the money as a trust. [LORD CAIRNS:—The simple question really is this, were the bankers bound to give notice of an intention to complete the purchase, or was the vendor, in the absence of it, bound to ask the bankers whether they would complete it or not?] The vendor here had notice that the bank had an actual charge on the property (3). Having that notice, he was bound to make inquiries:

(1) 10 H. L. C. 672. *John A. 1897* (3) There was a discussion as to the refusal by the bank to advance *Pooley*
 (2) 16 Ves. 249.

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Gibson v. Ingo (1), citing *Taylor v. Baker* (2). *Jones v. Smith* (3) fully explains his duty in that respect. The effect of the notice is said to be restricted by the case of — *v. Walford* (4). There the vendor had executed a deed engaging to surrender a copyhold to *C.*, the purchaser's nominee, and a mere notice that the purchaser had afterwards made an agreement with one *W.* to surrender to *W.* the copyhold (which, of course, he could not do till it had been surrendered to himself) could not affect that deed, and relieve the vendor from its stipulation. But the circumstances of this case were very different. Here *Foster* had agreed to sell to *Pooley*, and *Pooley* had paid a large part of the purchase-money, and had then agreed with the bankers to make a formal assignment to them of his contract of purchase; and of this agreement *Foster* received notice, and had acknowledged the receipt of the notice; yet after that he allowed *Pooley* to complete the purchase and to obtain the conveyance, without paying any regard to the right of the bankers, although he had received and accepted full notice of it. The vendor is absolutely bound to perform his contract, and here the vendee has transferred the benefit of that obligation to a third party. [LORD CAIRNS:—Your argument goes to this, that if the vendee has entered into an agreement to assign, the vendor is bound to see that he performs his agreement.] The vendor being in Equity a trustee for the vendee—and in this case having, by the grant of the lease, surrendered his own rights (all except that of merely holding the deeds till the money was completely paid)—he was bound to give effect to the agreement of the vendee, of which he had received due notice. The principle was shewn in *Rose v. Watson* (5), though it was not entirely capable of being carried out there, because there the contract could not be completed; but there the character of the vendor as trustee for the vendee was fully recognised by Lord Chancellor *Westbury* (6), and by Lord *Cranworth* (7). It is

money to enable him to complete the purchase, but this became immaterial by the decision; so did a question as to the parties to the bill.

(1) 6 Hare, 124.

(2) 5 Price, 306.

(3) 1 Hare, 43.

(4) 4 Russ. 372.

(5) 10 H. L. C. 672.

(6) Ibid. 681.

(7) 10 H. L. C. 688-684.

10 H. L. C. 672.

distinctly set forth, and its consequences explained, in *Saunders* on Uses (1) and *Sugden* on Vendors and Purchasers (2).

An equitable interest under a contract of purchase may be the subject of sale, and the subvendee acquires the same rights as were possessed by the original vendee: *Wood v. Griffiths* (3); *Baldwin v. Belcher* (4); it is the same with an option: *Buckland v. Papillon* (5). *Pearce v. Morris* (6) does not apply here.

Sir *R. Palmer*, Q.C., and Mr. *W. F. Robinson*, for the Respondent:—

The vendor here was a mortgagee who had a power of sale, and who sold, as the particulars of sale expressly declared, with the consent of the mortgagor. He was therefore responsible to the mortgagor and was bound to see that the stipulations of the contract were fully carried into effect, and was not himself the absolute owner who might in any way he pleased divest himself of the property.

The general effect of a contract of sale is well known, and the citation of authorities upon that point is needless, but there is not one which justifies the attempt to make this Respondent liable to the banking company. A vendor of an estate is not truly described when he is merely described as a trustee for the vendee. He has a particular and defined character, and his rights and liabilities are restricted, and *à fortiori*, they are so under such circumstances as exist in this case. His character is clearly defined in *Wall v. Bright* (7), where it is said by the Master of the Rolls: "The vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate. There are these essential distinctions between a mere trustee and one who is made a trustee constructively by having entered into a contract to sell; and it would, therefore, be going too far to say that they are alike in all respects. The

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(1) 4th Ed., tit. "Bargain and Sale."

(2) Chap. 5.

(3) 1 Swanst. 56.

(4) 1 Jo. & Lat. 18.

(5) Law Rep. 2 Ch. Ap. 67.

(6) Law Rep. 5 Ch. Ap. 227.

(7) 1 Jac. & W. 494-503.

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principle that the agreement is to be considered as performed, which is a fiction of Equity, must not be pursued to all practical consequences. It is sufficient to say that it governs the equitable estate, without affecting the legal." [LORD CAIRNS:—In a similar manner Lord Justice *Turner* expressed himself in *Sherwin v. Shakespeare* (1).] A purchaser might be bound, though a vendor might not, by the liabilities of the other contracting party. A notice to a purchaser of a vendor's liabilities would put the purchaser upon making inquiries, and he must take the consequences of neglecting to do so; but there is no such obligation attaching to a vendor—he cannot be bound by anything but distinct notice of existing rights. In *Baldwin v. Belcher* (2) there was not a mere agreement to do a future act, but a judgment confessed and a mortgage executed; but even there Lord Chancellor *Sugden*, while declaring the rule, as generally expressed, that after a contract has been entered into the vendor is a trustee of the estate, qualified it by saying, "The purchaser has neither a legal nor an equitable right as against the seller, until he pays the purchase money." In *Re Cuming* (3) a vendor died, his customary heir was insane, and yet the copyholds which had been purchased and paid for, were treated as not having completely become the property of the vendee, but the Court appointed a person under the *Trustee Act* to perform the duty, still held to be necessary, of making the formal surrender to the purchaser. Lord Justice *Giffard* said, "where there is only a contract for sale, a suit is necessary to declare the vendor a trustee," though he thought where the contract had been, as it had been there, executed by payment of the purchase-money, and a formal covenant to surrender, no suit was necessary, and he appointed a trustee upon motion. Here there was only a contract for a sale, partly executed, and subject to the happening of uncertain events before it was completed, and a suit might have been necessary to enforce the rights which the bankers claimed against *Pooley*, the vendee. *Mangles v. Dixon* (4) shews very distinctly that the person who took the security as assignee took it with all the equities to which the person who gave it was subject; that this assignee of the security was the person to make inquiries,

(1) 5 De G. M. & G. 517, 537.

(2) 1 Jo. & Lat. 18.

(3) Law Rep. 5 Ch. Ap. 72.

(4) 3 H. L. C. 702, 732-733.

and that the other party, the creator of the security, was not bound to go after the assignee and perform that duty for him.

A promise by a vendee to assign his contract cannot have any operation on the rights of the vendor. There must be an actual transfer of his rights to produce that effect, and even then the transferee must go to the vendor and put himself in the situation of the original vendee and undertake to discharge his liabilities: *Pearce v. Morris* (1). He must do what the vendee had bound himself to do. If not, the vendor will not be bound: *Dyer v. Pulteney* (2). If that was not so, the greatest injustice might be inflicted on a vendor.

The Appellant here is an equitable mortgagee by the deposit of title deeds. The relation between him and the owner of the estate is slight. What is the position of an equitable mortgagee? It is shewn in *Moore v. Greg* (3), where it was held that an equitable mortgagee of a lease was not compellable in Equity, at the suit of a lessor, to take a legal assignment of the lease, although he might have entered into possession of the premises and paid rent. Nor was he to be held liable to the covenants, there being no privity between him and the lessor until he had made himself the legal assignee, for otherwise no man would consent to take an equitable mortgage as a security for a debt. But if so, surely his own freedom from liability could not impose a strict burden of liability on the person as to whose estate he became an equitable mortgagee. *Walters v. Great Northern Railway Company* (4), explains the slight nature of the relations between the parties in such a case as the present.

The case of *Rose v. Watson* (5) is not an authority for what the Appellant here requires, for it did not determine that a person who had no other right than that of being able to require an equitable mortgagor to convert the equitable into a legal mortgage might come on the vendor for satisfaction of his imperfect security, but only that if a purchaser was bound to make successive payments in discharge of his purchase, each payment he so made under that obligation transferred to him a corresponding portion of the estate.

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(1) Law Rep. 5 Ch. Ap. 227.

(2) Barnard. Ch. Cas. 160.

(3) 2 Phill. 717, 725.

(4) 5 De G. M. & G. 643.

(5) 10 H. L. C. 672.

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In other words, the performance of his legal contract gave him legal rights. Here the equitable mortgagees claim rights without any offer of accepting and discharging corresponding liabilities. In no way whatever do they propose to perform the legal contract of the vendee. They knew what was *Pooley's* liability, but they would not undertake to discharge it. They did not even press for the execution of the mortgage by him, although he had undertaken to execute one with such "reasonable and fair" covenants as their own solicitor, in his discretion, should think fit. They declined to assume those liabilities without assuming which they could not pretend to require the vendor to place them in the vendee's situation, so as to secure the benefits to which he was entitled. [LORD CAIRNS:—Here is an agreement to assign. That does not bind you to ask from day to day whether the agreement continues, and you have been put in a situation to be bound to assign.] Certainly not. And the bills of costs between the bankers and their solicitors [to which the learned counsel referred] shew that the bankers had never made up their minds to give themselves any such right by assuming any corresponding liability. They gave to the Respondent a dry notice of what had occurred between themselves and *Pooley*, but never claimed, nor ever even asked, that they should have notice of what might afterwards occur between *Pooley* and the Respondent. This notice had no valid effect, and could not prevent the vendee from calling for the execution of his contract; nor would it afford the vendor an excuse for a refusal to execute it.

The attempt here is to bind the Respondent by what is merely a constructive notice of what might, possibly but not necessarily, become the legal rights of the bankers. In *Jones v. Smith* (1), Vice-Chancellor *Wigram* shewed how difficult it was to apply the doctrine of constructive notice to the various cases that arose in everyday life, and said that *Daniels v. Davison* (2) had always been considered an extreme case. Persons who, under a supposed assignment, seek a benefit at another's expense must give him a plain and full notice of their rights and of his alleged obligations. A mere constructive notice is not sufficient: *Bates v. Johnson* (3); *Cothay v. Sydenham* (4), in which case Lord *Thurlow* said: "If the notice

(1) 1 Hare, 43, 62-64.

(2) 16 Ves. 249.

(3) 1 Joh. 304.

(4) Law Rep. 5 Ch. Ap. 227.

5 Jur. R. S. 842
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had been of a deed actually executed, it certainly would do ; but where the notice is not of a deed, but only of an intention to execute a deed, it is otherwise."

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The *Solicitor-General* replied.

LORD CHELMSFORD, after stating the nature of the questions in the case, said :—

According to the well-known rule in Equity, when the contract for sale was signed by the parties Sir *William Foster* became a trustee of the estate for *Pooley*, and *Pooley* a trustee of the purchase-money for Sir *William Foster* ; and it was competent to *Pooley* to assign the benefit of his contract, or to charge his equitable interest in the property in favour of another person, and upon notice given to Sir *William Foster* of such assignment or charge, he would have been bound to protect and give effect to it. 2 Ch D. 508

It was insisted upon by the learned counsel for the Appellant that *Pooley's* relation to the property was closer than that of a mere *cestui que trust*. That the stipulation that possession was to be taken in twenty-one days and the lease granted to *Strange*, together with payment of £12,500 of the purchase-money, put *Pooley* in complete possession of the property and left Sir *William Foster* nothing but a lien for the purchase-money remaining unpaid. It seems to me quite unnecessary for the determination of the case to consider how far this view of the position of *Pooley* is accurate ; because to the extent of the £12,500 paid by him it cannot be reasonably doubted that, according to what was said by Lord *Cranworth* in *Rose v. Watson* (1), *Pooley* acquired a lien "exactly in the same way as if upon payment of the money Sir *William Foster* had executed a mortgage to him to this extent." Nor can there be any ground for doubting that the interest *Pooley* had so acquired he was entitled to transfer or to create a charge upon, and that upon proper notice to Sir *William Foster* of *Pooley's* having done so, *Foster* would have become a trustee for the transferee or the person to whom the charge was given.

This being the clear law upon the subject, the only questions open for discussion in the case are : In what manner *Pooley* dealt

(1) 10 H. L. C. 672. 10 Jan 25. 297

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with his interest under the contract; and whether Sir *William Foster* had proper notice of any binding interest or right which any other person had obtained in it.

Pooley being indebted to the *Birmingham Banking Company* to a large amount, on the 28th of February, 1865, deposited the contract with them, but no memorandum of deposit was taken. But *Pooley* at the same time executed a deed-poll by which he charged his freehold estate in *Sussex* called *Southover Hall*, and agreed, upon request, to execute a conveyance of the same, and he also agreed to execute an assignment of his contract with Sir *William Foster* for the purchase of the leasehold premises called the *Alhambra Palace* by way of mortgage as a farther security.

No notice of this transaction was given to Sir *William Foster* until the 3rd of July following, when the bank arranged with the solicitor that notice should be given. A notice was accordingly prepared and sent to Sir *William Foster* with a request that he would indorse upon it an acknowledgment of its receipt; which he did, and returned it to the solicitor. The notice was in the following terms:—[His Lordship read it.]

The exact extent of the information conveyed by the notice has been matter of controversy; but it was contended on behalf of the Appellant that the letter of the solicitor accompanying the notice stated expressly that the bank claimed to have a charge upon *Pooley's* contract. I apprehend, however, that the name thus given to the interest acquired by the bank cannot change the character of the notices, but the terms of the notice itself must be considered in order to ascertain what, after months of delay and under the advice of their solicitor, it was thought advisable that the bank should notify to Sir *William Foster*.

What, then, was the notice given? Certainly not that the bankers had an actual charge upon *Pooley's* contract, but merely that they had an agreement with *Pooley* that he would at any time thereafter, at their request, execute an assignment by way of mortgage of his contract. It is unnecessary to consider whether, as between the bankers and *Pooley*, a previous request was essential to give them a right to the mortgage; because such a request is admitted to have been made as early as in March, 1865, and a draft mortgage was sent to *Pooley* for approval. But this fact, uncommuni-

cated as it was to Sir *William Foster*, leaves the question open how far he was affected by the notice sent to him by the solicitor to the bank. There is no ambiguity in the notice. There is no mention in it of the deposit of the contract with the bank by *Pooley*; and it expresses in clear terms that the bank would be entitled, upon request, to have an assignment by way of mortgage of *Pooley's* contract. Ought the bank to have been contented with giving such a notice, and to have considered that enough had been done in the way of warning to Sir *William Foster* not to complete the contract with *Pooley* to the prejudice of the rights of the bank? There is something in the conduct of the bankers not very intelligible, except upon the supposition that having the security of an actual charge on *Southover Hall*, they did not much regard the additional security on the *Alhambra*, which they might at any time have had upon request; or perhaps that it was a description of property which they did not much care to possess.

That the notice was advisedly drawn up in the form in which it was sent to Sir *William Foster* appears to me to be clear. Long before the 3rd of July when the notice was received, negotiations had been entered upon, and were continuing at the time, for substituting a leasehold distillery and premises at *West Ham* as part of the security to the bankers in lieu of the *Alhambra*. It was, therefore, probable that the *Alhambra* might be released from any charge which the bankers had upon it; and this may account in some degree for the form in which the notice was drawn, not mentioning either the fact of the deposit of the contract or the request which had been made to *Pooley* to execute the mortgage. It appears from the bill of costs of the solicitor to the bank, that it was arranged that formal notice of the charge upon the *Alhambra* should be given, after he had been informed that a mortgage of the distillery had been prepared, and that *Pooley* thought that the bankers could not object to hold the *Southover* property and give up the *Alhambra*, upon which £10,000 would shortly have to be paid to Sir *William Foster*.

Under these circumstances, the bankers having deliberately adopted the form of notice upon which they were content to rest, did anything occur between the time of its being sent to Sir *William Foster* and his completion of the contract, which ought to

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have operated as a warning to the bankers to take farther precautions to protect their interests? On the 27th of July, 1865, the solicitor to the bank was informed by letter from *Pooley* "that something must be done with the *Alhambra* security, as it would be forfeited to Sir *William Foster* unless £10,000 were paid to him in October," a clear intimation that *Pooley* would require assistance to enable him to complete his contract, which was more distinctly shewn by an application made by *Pooley* to the bankers to advance him £10,000 for the purpose. This they declined to do. But their solicitor states in his affidavit, that he did not suppose that *Pooley* could not provide the £10,000 "without the assistance of, and without committing a fraud upon the bank." The bankers knew, therefore, that *Pooley* could not himself provide the £10,000; but they anticipated that he would get it somewhere else, and entitle himself to have the contract completed. They knew that the time for completion of the contract was the 30th of September, 1865. It was actually completed on the 21st of November. And yet the bankers made no inquiries, and took no steps in the matter till the 9th of April, 1866, when a letter was written by their solicitor, asking what amount was remaining due for purchase-money, and they learnt that the purchase had been completed and the conveyance made.

It was argued by the Counsel for the Appellant, that the notice was at least sufficient to put Sir *William Foster* upon inquiry as to the nature of the interest possessed by the bank under the contract, and that having failed to inquire he is answerable to the bankers for the loss sustained by them in consequence of his conveyance to *Pooley*. In support of that argument the case of *Jones v. Smith* (1) was cited, where Vice-Chancellor *Wigram*, in a very able judgment, explained the rule in Equity as to constructive notice, which he divided into two classes; the first alone being necessary to be considered here, viz., where the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected. And it was insisted that Sir *William Foster* had actual notice that the property was "charged, or in some way affected." But the argument appears to me to proceed upon a mistaken application of the doctrine of

(1) 1 Hare, 43.

constructive notice. This is not a case in which a notice had been given in general terms that there was some charge upon the property, or that it was affected in some way. Such a notice probably would have bound Sir *William Foster* to make inquiry, which would have led him to a knowledge of the particular nature of the charge which the bankers had acquired. But here they give precise and distinct notice that their interest in *Pooley's* contract is to have an assignment of it by way of mortgage upon request. What necessity was there for Sir *William Foster* to make any farther inquiry? Why was he not to take the bankers at their word? If such a contingent interest as that of which Sir *William Foster* had notice, was not sufficient to prevent him from completing the contract with *Pooley*, why should he have communicated with the bankers before he executed the conveyance? It appears to me that if, upon the ground of the notice, Sir *William Foster* had refused to execute a conveyance to *Pooley*, and a bill for specific performance had been filed, the notice would have afforded no defence, and Sir *William Foster* would have had to pay the costs of the suit.

It is impossible to acquit the bankers of great neglect, both in the form of the notice which they gave, and in afterwards reposing upon it, and not taking the smallest step to guard themselves against the consequence of a conveyance being made to *Pooley* upon the payment of the remainder of his purchase-money, which a word from them would have prevented. And I think it would be most inequitable to compel Sir *William Foster* to make good to the bankers the loss which they have sustained by *Pooley's* misconduct, which was in great part, if not entirely, occasioned by their own negligence.

On these latter grounds I am of opinion that the Lord Chancellor's decree ought to be affirmed, and the appeal dismissed with costs.

LORD CAIRNS :—

My Lords, between seven and eight years ago a contract in writing was entered into between Sir *William Foster*, the Respondent, and *Alexander Gopsell Pooley* for the sale by Sir *William Foster*, who appears to have been a mortgagee with power of sale,

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of a leasehold property in *London* called the *Alhambra*. The purchase was to have been completed in twelve months from the date, which was the 30th of September, 1864. The contract was a valid contract, and the title that the vendor had to make was a good title and was accepted. And in point of fact the contract in process of time was duly completed.

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Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property.

My Lords, in that state of things Mr. *Pooley*, the purchaser, being the real and beneficial owner, I apprehend that there cannot be any doubt of the rights of Mr. *Pooley* with regard to the property of which he had thus become the beneficial owner. He had a right to devise it; he had a right to alienate it; he had a right to charge it. There are various ways that might be suggested in which, for valuable consideration, he might have created a charge more or less affecting the property. I apprehend that he might have contracted, for valuable consideration, with any person to whom he was indebted, that he (*Pooley*) would complete the purchase, and that when the purchase was completed and the property assigned to him, he would then make it over to the person to whom he was thus indebted. That would have been one way of dealing with his interest. Another way might have been this—he might have contracted with any person to whom he was indebted that he would pay the purchase-money remaining unpaid, and that then, the purchase-money being thus paid, and the time for the assignment having arrived, he would authorize and require the vendor to assign, not to him, *Pooley*, but to the person to whom he

was indebted. A third and a simpler way in which he might have affected his interest would have been to contract with any one to whom he was indebted to assign to him the contract which he had entered into in whole, making the person to whom he was indebted assignee of the contract. Any one of those modes might, in my opinion, have been resorted to; and the only qualifications to which all or any of them would have been subject are these: first, that by none of these modes could anything have been done by Mr. *Pooley* derogating from, or impeding, or delaying the rights of the vendor to require the fulfilment of his contract according to its terms; and, secondly, whatever course was taken by Mr. *Pooley* and any person with whom he contracted to charge his interest, notice of the particulars of that charge, and the mode and form of the charge, would be required to be given to the vendor, in order that the vendor might shape his course according to the notice he had thus received.

My Lords, these are principles which are elementary, and I only refer to them, not because they require to be repeated to your Lordships, or to be established by argument, but lest it might be supposed that they had been brought into doubt by anything which has happened in the course of this case.

That being the position of the parties, what subsequently took place was this:—Mr. *Pooley* was indebted, and was likely to be farther indebted, to the *Birmingham Banking Company*, here represented by the Appellant. He had property distinct from the *Alhambra*—freehold property in the south of *England*—and he executed a document professing to give a certain amount of security to the bank. I will refer to the terms of that document in a moment, but before doing so I should mention that on the occasion of his executing this document to the bank he deposited also with the bank, not merely the title deeds of the freehold estate to which I have referred, but the contract he had entered into with Sir *William Foster*. My Lords, I notice that deposit merely for this reason, that I may say it appears to me that nothing in the case turns upon the fact of the deposit, for two reasons:—In the first place, no notice of any kind was ever given of the deposit as distinct from the document to which I have to refer presently, the contract with Sir *William Foster*; in the second place, although

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it is a well-established rule of Equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in Equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed.

The document, therefore, is that to which I must call your Lordships' attention. It is dated the 28th of January, 1865. It states the liabilities which Mr. *Pooley* had come under, or was likely to come under, to the bank; and it continues in these words:—"And in consideration of the premises I hereby charge my freehold estate known as *Southover Hall*, near *Burwash*, in *Sussex*, with the due payment of the said sum of £50,000 represented by my said acceptances. And I agree with and to you that I will at any time hereafter, on your request, and at my own costs, execute to you or other the trustees for the time being of the said company a valid conveyance of the said estate (subject to the existing mortgage thereon to Miss *Lee* for £7800) by way of mortgage for securing such sum and interest thereon at 5 per cent. per annum"—that refers to the *Burwash* estate—"and also a valid assignment of my contract with Sir *William Foster* for the purchase of the leasehold premises called the *Alhambra Palace*, *Leicester Square*, *Middlesex*, by way of mortgage for farther securing the same sum and interest, which said mortgages shall be prepared by your solicitor, and shall contain all such usual, reasonable, and fair clauses as he shall in his discretion think fit."

Now, my Lords, there are two matters connected with this document or deed-poll to which I must call your Lordships' attention. In the first place, it purposes to be, so far as the *Alhambra* is concerned, an agreement to make a valid assignment of the contract for the *Alhambra*; and in the second place, it is an agreement to make a valid assignment of that contract, not absolutely, but upon request being made. I have taken the liberty of suggesting to your Lordships three different modes in which Mr. *Pooley* might have dealt by way of a charge with this newly-acquired property

of his. The particular mode which has been taken is one of those to which I have referred, namely, an agreement to make an assignment of a contract.

It is not an agreement to charge the property when his contract might be completed; it is not an agreement to pay up the unpaid purchase-money, and then require the vendor to execute a conveyance of the land; but it is an agreement, in the terms which I have read, to execute a valid assignment of the contract.

Now, dwelling upon these words, in the first place, it certainly appears to me that speaking of a contract of the kind I have described, if the purchaser agrees with another person to execute an assignment of a contract of that kind, the agreement must, in my opinion, be read as an agreement to put the assignee into the position of the purchaser—the assignee assuming that position, and taking the position of the purchaser *cum onere* with the obligation of performing the duties which the purchaser would otherwise have to perform for the fulfilment of the contract.

But without dwelling farther upon that, I will ask your Lordships to look at the other terms of this instrument. It is not merely an agreement to execute a valid assignment of a contract; but it is an agreement to execute a valid assignment of the contract upon, and only upon, a request. My Lords, I think those words are not words of superfluity, but they are words of substance and reality in this case; for abundant reason, as it appears to me, exists for putting that construction upon these words. If these words had been without meaning, the question at once arises, why were they inserted in that part of the document which relates to the *Alhambra*, and why were they not inserted in that part of the contract which relates to the *Burwash* estate? The agreement assumes a perfectly different form of wording when dealing with those two separate estates. As to the *Burwash* estate it is, in the first place, an absolute charge upon the estate. And then an agreement follows to execute a mortgage upon request. But with regard to the *Alhambra* property there is no charge whatever upon the property. The document does not mention the *Alhambra* property except in those words I have read, agreeing upon request to execute an assignment of the contract.

My Lords, another observation of the same kind may be made.

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If it was intended to create by this instrument that which would be equivalent at once to an assignment of the contract—if it was not intended to be merely a promise to make an assignment of the contract upon request, then, I ask, why was the assignment not then actually made by Mr. *Pooley* in this document? With regard to the mortgage of the *Burwash* property there was very good reason for treating the mortgage as a document to be afterwards executed, because we all know that the mortgage of a freehold estate requires an examination of the title, with the aid of a skilful conveyancer and a considerable delay in the preparation of the necessary instruments; but with regard to a document of this kind, not an assignment at Law, but only an assignment in Equity, if the parties had been so minded the property could have been assigned by this very deed which your Lordships have before you, as well as by the most skilful conveyancer in the world.

My Lords, there is still another observation which occurs to me as shewing the importance of those words “on request” in the view of the parties to this instrument. The property comprised in the contract of sale, called the *Alhambra*, was a property clearly of a speculative character; it was a leasehold property, and the obligations upon the holder of a property of that kind under lease would be very serious obligations. It might very well be the case that before the bankers would actually undertake an assignment of a contract which might, in the result, oblige them to take this property with all its obligations, they would desire to consider whether by means of other securities, or otherwise, as, for example, by reducing the account of Mr. *Pooley* with the bank, they might not obviate the necessity of having anything to do with a speculative property of this kind.

My Lords, these are the reasons which satisfy my mind that the words by which Mr. *Pooley* undertook to make a valid assignment “upon request” were words of substance in the contract, and that we must find in the subsequent progress of the case both an actual tangible request on the part of the bank, to Mr. *Pooley* to make this assignment, and also notice of the request, if it were made, to Sir *William Foster*.

Then, my Lords, what passed afterwards was this:—The document I have read as having been made is dated in January, 1865. No

notice of any kind was given to Sir *William Foster* till the month of July in that year. Time was running on; the purchase-money was unpaid—it had to be made up and the contract had to be fulfilled by the month of September in that year. In July, a notice was given to Sir *William Foster*, to which I will refer your Lordships in a moment. But before I do so I am disposed to ask your Lordships to consider whether, in point of fact, before the month of July, in which this notice was given, there had been, as between the bankers and Mr. *Pooley*, any request to execute an assignment of the *Alhambra* property. Of course, even if we find a request from the bankers to Mr. *Pooley* that will not be enough unless the fact of the request is communicated to Sir *William Foster*. But if we find, in point of fact, no request as between the bankers and Mr. *Pooley*, then the case will be very much stronger, because, of course, it would be impossible to give to Sir *William Foster* notice of a request which did not exist.

My Lords, the request which is urged on the part of the bankers is presented in this way. They say that in the time that had elapsed between January and July, 1865, a draft mortgage was sent by the solicitors of the bank to the solicitors of Mr. *Pooley* to be approved of by them, and returned; and that that draft mortgage contained an assignment of the contract with regard to the *Alhambra*. It is quite true that the draft mortgage contained an assignment of the contract with regard to the *Alhambra*, but it was coupled with a covenant imposing upon Mr. *Pooley* the obligation to pay the £10,000 which remained unpaid of the purchase-money. Now, my Lords, I take leave to say, that if the case had turned upon that draft mortgage (which it does not), I doubt extremely whether that draft so prepared could be held to be an assignment of the contract within the meaning of the document which I first read; and if it was not a proper assignment of the contract, then of course there was no request to Mr. *Pooley* to execute an assignment according to the proper meaning of his undertaking. In my opinion, the undertaking is to assign a contract—not to assign the property or a charge upon property. But an undertaking to assign a contract means to assign it in such a way that the assignee will take from the assignor the whole of the obligations of the contract and fulfil

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them according to its terms. And a document which professing in the first part to assign a contract, leaves by the second part upon the assignor the whole of the obligation of the contract, is not, as I think, an assignment of a contract at all. But I do not pursue that farther, except to remark the fact to which I have referred, that that draft mortgage so prepared was, I think, not an assignment of the contract; so that there was no request whatever on the part of the bank to Mr. *Pooley* to assign the contract.

But let us assume that it was a request to assign the contract. Was any notice given of that request to Sir *William Foster*? The notice to Sir *William Foster*, given in July, 1865, assumes the date of the 28th of January, 1865, six months previous. I do not, however, dwell upon that. Let us turn to this notice of January, 1865, and to the letter of July, 1865. They are in these terms:—
 [His Lordship read them.]

It was attempted in the argument to eke out what was alleged to be wanting in the formal notice by the contents of this accompanying letter, but it appears to me that the letter does not in any way enlarge the effect of the formal notice. It refers to the formal notice. It calls it, “Notice in duplicate of a charge.” But the notice must speak for itself, and the contents of the notice must be that which will guide us in determining what it was that was conveyed to the mind of Sir *William Foster*. Now I read the notice as it is. A notice simply following the words of the deed-poll. A notice that Mr. *Pooley* has agreed—not to assign his contract—but to assign his contract “on request”—to assign his contract if requested so to do. No information whatever was given to Sir *William Foster* (and that appears to me a cardinal matter in the case) of any request to Mr. *Pooley* to make the assignment.

Now this remark naturally arises upon that part of the case. Either there had been a request made to Mr. *Pooley*, or there had not. If there had not, of course no notice could have been given of it. If there had, why was not notice given of it to Sir *William Foster* at this time? If it was, as I submit to your Lordships, a cardinal element in the title of the bankers, the notice to Sir *William Foster* omits to state the fact, if the fact had any existence.

My Lords, it appears to me that that was a notice which did not

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interfere with the right of Sir *William Foster* to complete the contract with Mr. *Pooley*. It did not give notice to Sir *William Foster* that Mr. *Pooley* had denuded himself of the contract with its obligations. It did not give notice to Sir *William Foster* that he was no longer to deal with Mr. *Pooley* as the person to receive the completion of the agreement of the leasehold interest, as soon as the purchase was complete.

My Lords, what passed afterwards appears to me to throw considerable light upon the infirmity of the title of the bankers, to which I have just adverted. I turn to the statement of the bank manager himself, and I find what he says is this: he speaks of a proposal which had been made by Mr. *Pooley* to deliver up some of his securities about the month of July, 1865, and he says: "I, on behalf of the bank, declined to deliver up to the said *Alexander Gopsell Pooley* his securities on the terms proposed, or to make any farther advances to him, and I have no doubt I told him he must find the £10,000 himself. I say, the alternative of the bank advancing the additional £10,000 due to Sir *William Foster*, or allowing the said contract for the purchase of the said *Alhambra Palace* to be forfeited, was never presented to me, or, as I believe, to any of the directors of the bank. I say, on the contrary, I considered it was the duty of the said *Alexander Gopsell Pooley* to complete his said contract with the said Sir *William Foster* without the assistance of the bank, and subject to the claims of the bank."

Is that the view that a person who was the assignee of a contract ought to have taken, that it remained the duty of the assignor, in spite of the assignment, to complete the contract to pay the purchase-money, but to do that subject to the claims of the bank. My Lords, I venture to think that the manager of the bank entirely misapprehended the position of the bankers. If they had requested the assignment to be made to them, and if they were entitled to say that by reason of that request they were assignees of the contract, this certainly was not the position in which they stood, that they should remain passive and quiescent while Mr. *Pooley* fulfilled the contract with Sir *William Foster*.

Then what follows is this: The manager, in the portion of his evidence that I have read, speaks of the month of July. It appears from the bills of costs which are in evidence, and from the

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correspondence (I will not go through them in detail, but will state the result of them to your Lordships), that at this time, the month of July, and in the following months, there were considerable negotiations going on between the bank and Mr. *Pooley*. It is quite evident that the bankers were extremely anxious to obtain from Mr. *Pooley* a security upon a certain distillery by way of consideration for any rights which they might have under the original deed-poll with reference to the *Alhambra* property. And it appears to me, as the result of these entries in the bills of costs, and of the correspondence, that they looked upon the *Alhambra* contract as a matter of which they would gladly have washed their hands, provided they could get something that would be more tangible and more substantial in place of the contract.

The contract, however, was, as I have said, to be completed on the 30th of September, 1865. From the month of July, 1865, until the month of April, 1866, that is, until some six months after the time when the contract was to have been completed, the bankers never approached Sir *William Foster*; they never wrote to him—never proposed to him to complete the contract—never asked him whether anybody else had completed it, and never sought any information whatever with reference to the pendency or the completion of a contract which was in their own possession, and which would have told them upon the face of it that it was of the essence of the dealings between the parties that the purchase-money should be paid and the contract completed on the 30th of September, 1865, or at such other time thereafter as Sir *William Foster* might think fit to allow. But in the month of March, 1866, months after the time for the completion of the contract, the bankers appear to have found that it would be impossible to obtain from Mr. *Pooley* any satisfactory security upon the distillery I have mentioned, and then I find, upon the 3rd of March, 1866, this entry in the bill of costs of the bank's solicitor: "Attending on the manager advising and conferring on Mr. *Pooley's* position, he not having completed the mortgage of the *Southover* property according to my draft, but there was reason to believe he had completed the purchase of the *Alhambra* lease with Sir *William Foster*, and had mortgaged it to clients of *Parson & Lee*" (who, I think, were Mr. *Pooley's* solicitors, who were acting for him) "and

it was ultimately arranged that the manager should make farther inquiries as to the correctness of this supposition."

Now, can anything be more illustrative of the position of the bankers according to their own judgment than this entry six months after the time fixed for the completion of the contract? They speak of its coming to their knowledge that the contract had been completed with Sir *William Foster*, and that the *Alhambra*, when this property passed over to Mr. *Pooley*, had been mortgaged to clients of Mr. *Pooley*, the purchaser. That is spoken of as a thing which caused no surprise whatever to the bankers, but it had become an obstacle to the return of the mortgage deed so far as it professed to include the *Alhambra*. But what was the result? One would suppose that this would be considered by the bankers to be a breach of the engagement with them, and that at all events they would have put themselves in motion immediately, that they would have appealed to Sir *William Foster*, that they would have appealed to Mr. *Pooley*, and taken steps at once to set right any wrong which had been done by any party. But we find that no communication whatever was made to Sir *William Foster*, even after this came to the knowledge of the bankers, till the 9th of April, more than a month subsequently; and that then the communication to Sir *William Foster* was not made except in consequence of the circumstance that the bankers found it hopeless to get the security on the distillery, because this is the entry relating to Sir *William Foster* in the bill of costs on the 13th of March: "Attending on the manager at the bank, advising and conferring farther Mr. *Pooley's* inquiry as to the proposition of the substituted security on the distillery; but it appeared that the directors had decided nothing definite." Then, on the 9th of April, there is this entry: "Attending on the manager at the bank in long conference, and advising at great length on the position of *Pooley's* securities; when it appearing utterly impracticable that Mr. *Holden* would carry out his proposition, it was arranged that *Pooley* should be required to complete his *Southover* and *Alhambra* security. Writing Messrs. *Parson & Lee*, urging return of draft mortgage approved on behalf of Mr. *Pooley*. Writing Sir *William Foster* to know what amount was due on the *Alhambra* for purchase-money." I must say, anything more insincere, unreal, and inaccurate than these statements in this bill of costs I never read, because these

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statements are plainly put in as if the persons who wrote them believed that at this time, on the 9th of April, the purchase was not completed, and as if the *Alhambra* were still in Mr. *Pooley's* possession, whereas they knew perfectly well (as appears by the entry on the 3rd of March previously) that the purchase was completed, and that a mortgage had been made by Mr. *Pooley* of the property. However, the bill of costs shews that the idea that the bankers had this right against Sir *William Foster* by reason of the notice which it appears they served on the 19th of April, was entirely an afterthought. It is an idea which, as it appears to me, they never could possibly have entertained during the whole of the month of March and in the earlier part of the month of April. It was an afterthought which occurred to them, as it seems to me, because the bankers found it hopeless to get—though they very much wanted it—the other security from Mr. *Pooley*. Then, and then only, did they call upon Mr. *Pooley* to perfect his security for the *Alhambra* property, and they called upon him to do so at a time when they knew that they were much too late, in consequence of the property having been mortgaged elsewhere. My Lords, I repeat that I doubt whether, as between the bankers and Mr. *Pooley*, there ever was any request according to the terms of the deed-poll to assign the *Alhambra* contract; but if there ever was such a request, I am clearly of opinion that it never was communicated to Sir *William Foster*. It appears to me clear that unless it was communicated to Sir *William Foster* he had no notice which should lead him to hold his hand in dealing with Mr. *Pooley*. It seems to me that Sir *William Foster* had a right to complete the contract with Mr. *Pooley* as he did complete it. And I own I am not impressed with the *bonâ fide* character of the claim made by the bankers only after they found that they could not get from Mr. *Pooley* that security which they would very much have preferred to obtain.

Therefore I entirely agree with what my noble and learned friend has proposed to your Lordships—that this appeal should be dismissed, and dismissed with costs.

LORD O'HAGAN :—

My Lords, in this case, when it is duly considered, there seems to be little room for controversy either as to law or fact. The

question in it, which is novel, arises on the application of established principles to transactions which are represented substantially in the same way on either side, and we have to deal mainly with the inferences to be drawn from documentary evidence which neither party in the least impeaches.

Although a good deal of time was occupied in a learned disquisition on the effect of a contract for sale, as creating an equitable estate in the purchaser, I do not apprehend that there is any doubt, or that the noble and learned lord whose judgment we are considering could have meant to suggest any doubt, upon that subject. The law is clear. It is, as Lord *St. Leonards* has said, "one of the landmarks of the Court": *Baldwin v. Belcher* (1); and it ought not to be called into question. By the contract of sale the vendor in the view of a Court of Equity disposes of his right over the estate, and on the execution of the contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase-money; or, as Lord *Westbury* has put it in *Rose v. Watson* (2): "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is in Equity transferred by that contract." This I take to be rudimental doctrine, although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee. Thus, as it is stated by the Master of the Rolls in *Wall v. Bright* (3): "The vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate." Another qualification subsequently taken by Lord *Cranworth* in the case to which I have already referred, *Rose v. Watson*: "When, instead of paying the whole of the purchase-money, he (the vendee) pays a part of it, it would seem to follow as a corollary that, to the extent to which he has paid the purchase-money, to that extent the vendor is a trustee for him." And it is farther

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(1) 1 Jo. & Lat. 18.

(2) 10 H. L. C. 678.

(3) 1 Jac. & W. 508.

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very clear that the interest so vested in the purchaser may be the subject of charge or assignment, and that the sub-assignee or incumbrancer may enforce his rights against the vendor, at all events if he assumes the position of the vendee, and fulfils the duties and sustains the liabilities created by the contract.

These doctrines are clear and unquestionable, and the judgment in this case must not be considered as assailing or infringing them in any way. It is not a case between the immediate contracting parties, and although the sub-contractor has his rights as against the original vendor, they are not exactly those of the person from whom he derives. He is not in direct privity with the vendor, and he must put himself in such privity, give proper notice of it, and look for the concession of his claims as representing the vendee on the fulfilment of reasonable conditions. The authorities do not very precisely define the relations between the vendor and the sub-assignee; but it seems plain that the former is entitled to stand upon his contract, and that the latter, who is bound by it, cannot create a title in another with whom the vendor has not dealt at all which shall transcend its operation or derogate from its force.

This being so, we have to consider the nature of the sub-contract, and the conduct of the sub-contractor with whom we have to do, before we can pronounce him entitled to claim the privileges of a *cestui que trust*, and limit the free action of the original vendor in dealing with the vendee according to the strict terms of his undertaking.

In this case, the contract itself is not without significance, as explaining the views of the bankers and casting light on the subsequent proceedings. Mr. *Pooley* was largely indebted to them, and by his memorandum of deposit of the 28th of January, 1865, he sought to secure them in a double way; through his freehold estate of *Southover Hall*, and his contract for the purchase of the *Alhambra*. He deposited the title deeds of the first, and the contract as to the second—but that deposit is not material in the case—and he executed a contemporaneous agreement. A distinction is taken in that agreement; for the freehold estate is expressly and in terms *charged* with the payment of the sum of £50,000; whilst as to the *Alhambra*, there is no express charge, but a mere agreement

that *Pooley* shall execute, at the request of the bankers, a valid assignment of his contract at his own cost. The distinction may have been accidental; but it rather seems as if the bankers saw the advantage of having an effectual charge upon the freehold, which they held beyond question to be a good and safe security, but were content to bargain for a contingent assignment, at their own option, of a contract which from the character of the premises affected by it, they might, or might not, according to possible circumstances, desire thereafter to carry into execution.

We have had a good deal of observation about the nature of the *Alhambra* property, and the position of persons dealing with it; but whatever was that position, it is at least true to say, *primâ facie*, even if ultimate risk might have been avoided through the covenants by tenants and otherwise, it was not precisely that kind of estate with which a banking company would prefer to be concerned. And, accordingly, we find it demonstrated by the letters, and the entries in the bills of costs, that the bankers were very willing to negotiate for the substitution of another security on certain distillery premises. And it was whilst that negotiation was pending, and when, so far as we can see, they would have had no objection, as the entries state, "to give up the *Alhambra* upon which £10,000 would have to be paid shortly to Sir *W. Foster*," that they resolved to give him formal notice of their claim, "there being no longer any fear of prejudicing Mr. *Pooley* thereby."

All this seems to shew that the notice dated in January, for some unexplained reason—I suppose because the memorandum of deposit was drawn up in that month, but actually prepared in July—was not addressed to Sir *W. Foster* with a clear design or settled purpose to insist upon the contract, the rescission of which, *quoad* the *Alhambra* and themselves, the bankers were at that moment contemplating; but with a view of keeping the matter in hand, and providing for contingencies, playing fast and loose, and more or less "paltering in a double sense" between the parties.

In addition to this, the company knew that Sir *William Foster* was pressing for his £10,000, that he had threatened to file a bill to enforce the completion of the contract, and that a day was fixed for this completion which could not be overpast but through his indulgence; and they distinctly declined to help their debtor

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*Pooley* to discharge the unpaid balance, and so secure for himself, and for them, whatever advantage might be derivable from the purchase of the *Alhambra*. They might have intervened, they might have requested the assignment from *Pooley*, and insisted on it, they might have offered the money, if, indeed, the contract was so valuable as it is now represented to have been, and have required Sir *William Foster* to carry it to completion. And, I suppose, he would have had no disposition, even if he had had any right, to refuse. But they did none of these things. They lay by, with full knowledge of the rights of the vendor, of his resolution to enforce them, of the period of forfeiture, and the probability that it would be effected, and they put forward their demand for compensation only when many months had elapsed after the payment of the purchase-money, to which they had declined to contribute a farthing. And this, although Sir *William Foster* not only had the clear right to insist on the perfection of the sale long before he required it, but had also the clearest interest to insist upon it, that he might be protected at once against his liabilities to his mortgagor, and the dangers necessarily attaching to the peculiar property of which he desired to rid himself. Now all this being so, can this House be compelled by any established doctrine of Equity, merely because the notice, dated in January but prepared in July, was acknowledged by the Respondent, to mulct heavily a man in no default for the benefit of those who, if they had been really and *bonâ fide* in earnest, and active in asserting their rights, and fulfilling the conditions prescribed at once by law and honesty, had ample opportunity of avoiding any possibility of loss. What was that notice? Not a notice of an actual, but of a prospective and possible charge; not a notice of assignment, not a notice of a previous request, not a notice involving in itself a request that an assignment might be completed, but a simple statement of a deed-poll binding *Alexander Gopsell Pooley* to execute to the trustees of the *Birmingham Banking Company* "at any time thereafter at their request" a valid assignment of his contract. It was no notice of any actually existing charge. As I observed in the course of the argument, to call a thing, which you fully describe, a charge does not make it so, if from its own character and nature it ought not to be so designated. The notice

described, no doubt, an agreement, but an agreement to become operative only on a contingency; and it contained no allegation to indicate in any way that that contingency had happened. It shewed that a request had been contemplated, but it did not shew that it had been made. It stated the condition of the assignment of the contract, which would really have created a charge and an obligation, but it did not pretend that that condition had been fulfilled. It left to the sub-assignee the perfect freedom to hold by his sub-contract, or to abandon it by making or avoiding the request necessary to its completion. It gave the vendor no assurance that that sub-contract would ever be carried into effect. It offered him no undertaking; it made no demand; it warned against no action upon his part. Did such a notice fetter his freedom? Did it abridge his rights under the only contract to which he was himself a party?

No authority has been cited attributing such an effect to such a document. The vendor's claim to the balance of the purchase-money, and to have it paid on a given day, was undoubted, and his interest in enforcing that claim was equally clear. Was he bound to postpone the claim or to delay its enforcement by a notice of this kind? What duty did it cast upon him? Was it his business to hunt out information as to the making of the request or the execution of the assignment? That information the bankers necessarily possessed, and it was, in my judgment, their duty to give it, and not the vendor's to seek it. If they claim to rely upon a charge grounded on a contract, not inchoate and contingent, but consummated, at least by request, they with whom it lay to make that request should have alleged the making of it. They did no such thing; on the contrary, the notice, by the non-assertion of the fact, implicitly confesses its non-existence, and the vendor seems to me to have been quite at liberty to conclude that it had not taken place, because it was not relied on.

We have had a good deal of discussion as to the proof of an actual request, and it has been alleged that, by pressing for the execution of a mortgage, and otherwise, the bankers fulfilled that condition of their contract. But be this as it may, it is not pretended that any notice of such a proceeding ever reached Sir *William Foster*, and the Appellant is apparently in this difficulty:

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Either the request was made in the manner alleged, or it was not. If the first, the fact of making it was suppressed and withheld from the vendor; a course suggestive of sinister motives, and want of *bona fides*, and such as I think this House should not approve or allow to work detriment to the vendor, who was unwarrantably so kept in ignorance, lest, perhaps, the sub-contractor should be bound to a bargain which he might find it afterwards convenient to repudiate. Or, on the other hand, if no request was made, then the sub-contractor did not put himself into the position of a *cestui que trust* standing in the shoes of the vendor, and qualified to dictate to the vendor on proper terms the fulfilment of his bargain. The whole matter was *in fieri*—a transaction vital and active—until the conveyance was made; and I do not think, in the absence of coercive authority, that a notice so vague and slippery, making no proposal, followed by no action, and imposing no responsibility, should be held sufficient to interrupt the course of that transaction, and denude the vendor of the benefit of his contract with his own vendee, and his liberty to force it to completion.

We have had references to the well-known authorities on the subject of notice; but this case does not seem to me to come within the range of those authorities. No doubt notice of a deed is notice of all that the deed contains, and notice of one instrument which leads on reasonably to the knowledge of other instruments, and these to others, may be taken to be notice of the contents of all. But here the notice is not of that kind. It does not suggest inquiry as to any existing facts or documents which it does not itself disclose. It states a conditional and contingent contract, involving the possibility, and it may be the intention, of request. But it does not aver a request. On the contrary, as I have said, it impliedly negatives the existence of any. And I know no legal principle which binds a vendor under such circumstances to have regard to the bare possibility that at some after time such a request may be made, and to be perpetually watching for the making of it, which, if it occurs, must be in the cognisance of the other party, and on which it behoves him to rely. The case of *Cothay v. Sydenham* (1), cited by Mr. *Robinson*, is not inapplicable to the facts before us. There notice of a draft of a deed was held of

(1) 2 Bro. C. C. 391, 393.

no account, the Court declaring that notice of a deed actually executed would have been of course sufficient. "But here," says the Lord Chancellor, "the notice is not of a deed but of an intention to execute a deed." "There is no case or reasoning which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation." So here, applying the doctrine for the benefit of the vendor, whilst notice of an actual request might avail the Appellant, notice of the possibility, or the contemplation, or even the intention of a request, cannot suffice for his purpose; and as notice of the draft did not necessitate inquiring for the deed of which it was properly the herald, so notice that a request was the condition of an assignment, did not compel the vendor to search for evidence that it had been made. And so in *Jones v. Smith* (1), Sir *James Wigram* says, "The basis of the Plaintiff's argument is this, that a purchaser is imperatively bound to inquire wherever he has notice of a fact which by bare possibility may affect the subject of his purchase. The affairs of mankind cannot be carried on with ordinary security if a doctrine like that of constructive notice is to be refined upon until it is extended to cases like the present." In my opinion the doctrine thus condemned has no legitimate application here, and I conceive the notice relied on to be wholly insufficient in the circumstances of this case to maintain the Appellant's contention. It would have afforded no answer for Sir *W. Foster* if *Pooley* had required him to accept the purchase-money, and fulfil the contract; and it seems to me to give no sufficient foundation for the Appellant's claim against him because he did so.

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THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, this being an appeal from a judgment of my own, I have felt desirous that your Lordships should express your views on the subject before I stated my own. I confess that the opinion which I formed on the case on the original hearing has not been altered by the arguments that have been adduced before your Lordships, and, of course, it has been considerably confirmed by the view entertained by your Lordships on the case, which has

(1) 1 Hare, 55-69.

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coincided with my own as to its result, but does not at all, of course, bind your Lordships in any way to the reasonings on which I founded my judgment.

My Lords, I should stop here and not say a word more were it not for what I consider to be a very singular misapprehension which occurred with reference to some expressions in my judgment, and which expressions have occasioned the infliction upon your Lordships (for which I am sure I owe the House an apology) of the citation of authorities to prove the elementary proposition that the moment that a contract for sale and purchase is entered into and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the vendee. It is but a constructive trust. I do not see, on reconsidering the expressions I made use of, that I have in any way gone beyond the view entertained by Sir *Thomas Plumer*, and expressed by him in the case of *Wall v. Bright*. I will merely read the sentences to shew how extremely nearly alike they are in their phraseology; but perhaps there is one word put in by Sir *Thomas Plumer* which might have prevented ambiguity, if ambiguity there could be on this question, as to the subject-matter of consideration. The words used by me (1) are, "It is quite true that authorities may be cited as establishing the proposition that the relation of trustee and *cestui que trust* does, in a certain sense, exist between vendor and purchaser: that is to say, when a man agrees to sell his estate he is trustee of the legal estate for the person who has purchased it, as soon as the contract is completed, but not before." That was in reference to the actual conveyance. The expression used by Sir *Thomas Plumer* in *Wall v. Bright* (2), which has, I think, been just read by the noble and learned lord who preceded me, is this: "The vendor, therefore, is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey." What was meant to be said by him in that case, and by me in the present, is this, that you must always take that coupled with this remark: that as regards the contract itself—which, by a fiction of Equity, as Sir *Thomas Plumer* calls it (for the words are his, and not mine), is considered to be complete when it ought to be complete—you must not so use the words as

(1) Law Rep. 5 Ch. Ap. 610.

(2) 1 Jac. & W. 503.

to do away with the true intent of that fiction of Equity which supposes the money to be paid away with one hand and the estate to be conveyed away with the other. In other words, you must not use that doctrine as a means of impeding the completion of the purchase. What I said in this case before me was that no authority had been cited (and none has now been cited) to shew that a person having an engagement of this description, which has been commented upon already by the noble and learned lords who have preceded me with reference to the contract which was originally entered into between the present Appellant and *Pooley*, that person having an interest of the description of which he here gave notice, is not qualified to obstruct the completion of the purchase by means of the interest that he has so acquired, on the very ground, as it may be said, that Equity looks upon the vendor to be a trustee, and looks upon the vendee to be *cestui que trust*, solely upon the hypothesis that it considers all things to be done which ought to have been done, and it will take care, therefore, that everything that ought to be done shall be done before the relation is finally so constituted as to act against the very fulfilment of that contract, the implementing of which (as the Scotch would call it) is the very ground of the rule which has been established. Here the attempt, as it appears to me (and I have no more to say on the subject after the case has been so fully discussed), was an attempt on the part of those who claimed the benefit of this contract to say, we will, without paying the price of £10,000, insist on obstructing you in completing your contract with the purchaser who comes with the £10,000, who has it in his hand ready to pay you, and who demands the performance, on your part, of your duty—the duty of conveying the estate when the money is paid (as Sir *Thomas Plumer* expresses it), a duty which arises the moment the money is tendered to you. To say, as the bankers in the present case say—we will obstruct that, because if we had exercised our option we might have become the purchasers instead of you, and you shall not be at liberty to complete this contract unless it be also with the charge which you agreed to create in the event of our availing ourselves of the opportunity you gave us of completing the contract instead of yourselves, is a thing which cannot be permitted for a moment. It seems to me that this case comes

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clearly within the principle laid down in the case cited, of *Rose v. Watson* (1), namely, that it is one in which the persons claiming the benefit of the charge allowed (as the expression is there) the contract to go on between the original parties, and did not interfere with the execution of the contract, and apparently did not so interfere for the very express reason that they were unwilling themselves to take any steps to complete it, and sought, in fact, to obtain the benefit of the charge without performing the burdens still remaining to be discharged, burdens affecting the contract before it could be held to be fully completed.

*Order affirmed, and appeal dismissed, with costs.*

*Lords' Journals, 14th March, 1872.*

Solicitors for the Appellant: *Newman, Dale, & Stretton.*

Solicitors for the Respondent: *Field, Roscoe, Field, & Francis.*

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March 11.

CHARLES COPLAND (PUBLIC OFFICER OF } APPELLANT;  
THE BANK OF IRELAND) . . . . . }

AND

THOMAS PERRIER DAVIES AND P. } RESPONDENTS.  
O'CONNOR . . . . . }

*Construction of Statutes—Bankers and Bankruptcy (Ireland)—Deposit of Deeds.*

Though the preamble of one Act may appear to be directed against a particular evil, and though another Act may be passed to aid its application, the enactments of the second Act are not necessarily to be confined to the special purpose which seemed to be the particular object that the first had in view. Its own words must be considered as explaining and defining its objects and its means.

The 33 Geo. 2, c. 14 (*Ir.*) does not relate exclusively to persons who carry on the business of banking in the way of banks of issue, but to all bankers whatever.

The 33 Geo. 2, c. 14 (*Ir.*), is unrepealed except as to such specific matters contained in it as have been the subject of special legislation.

A memorandum accompanying a deposit of deeds made as security for a debt, and made by a person carrying on the ordinary business of a Banker, is

therefore within the provisions of the 33 Geo. 2, c. 14 (*Ir.*), and ought, according to their requirements, to be registered, in order to be valid as against creditors under a trust deed executed pursuant to the provisions of that Act.

The memorandum might have been registered, and ought to have been registered, even though the stoppage of payment by the Banker took place within one month after its date.

A trust deed so executed will be valid for all purposes affecting the distribution of the estate among the creditors, though it should be followed by a general bankruptcy.

The 10th section of the statute, which relates to the approval of a trust deed by the majority of the creditors, is merely directory.

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THIS was an appeal against a decree of the Master of the Rolls in *Ireland*, dated the 12th of December, 1868 (1), which had been affirmed on the 15th of June, 1869, by an Order of the Court of Appeal in Chancery there (2).

The Appellant is a public officer of "*The Royal Bank of Ireland*." The Respondents were the trustees of the creditors of *James Birch Kennedy*.

*James Birch Kennedy*, from 1845 to 1866, carried on business in *Dublin* as a dealer in securities and money, acting there as agent for *Glyn, Mills, & Co.*, of *London*, who on their part were his correspondents in *London*. Whether he legally and formally was entitled to be called and treated as a banker under the Irish Banking Statutes was the first question in the case.

During all the time he was in business *Kennedy* was a customer of the *Royal Bank*, and had obtained frequent advances from it on the security of bills and promissory notes, which he indorsed to the bank. His own business was said to be carried on in this manner: he received money on deposit, giving receipts for the same, discounted bills and notes charging commission thereon, allowed interest to his customers on balances left by them in his hands, gave them pass and cheque books, collected bills for them, and gave letters of credit on *London* and other places. He never issued any promissory notes payable to bearer on demand, or bank post bills, or other promissory notes or bills without stamps, nor ever obtained from the Board of Inland Revenue a licence to act as a banker issuing notes, nor had he in any way a bank of issue.

*Kennedy* was seised of lands at *Clanvaraghan*, in the county of

(1) *Ir. Law Rep.* 3 Eq. 31, *nom.* *Davies v. Kennedy*.

(2) *Ibid.* 668.

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*Down*, in extent about 366 acres, and producing a net profit rent of £296 per annum ; and also of the lands of *Marybrook, Dromore, Kinallen*, and others in the county of *Down* (part of *Lockhart's Quarter of Kinallen*) ; and of two houses, one in *Crow Street*, the other in *Temple Lane*, in the city of *Dublin*, under lease for the residue of a term of forty years. He was also possessed of a house and premises, No. 50, *Dame Street*, in the city of *Dublin*, and ground at the rear held, under lease dated 20th of December, 1834, for a term of 900 years.

On the 7th of July, 1863, *Kennedy* had presented, as owner of the lands of *Clanvaraghan*, a petition to the Landed Estates Court in *Ireland*, for an order for sale of these lands, which order was made on the 1st of August, 1863. It did not appear that this order was immediately acted on.

On the 3rd of May, 1864, *Kennedy* deposited, by way of equitable mortgage, with the Appellant, as public officer of the *Royal Bank*, the title deeds of the premises held by him at No. 50, *Dame Street, Dublin*, as a security for any advances that might from time to time be made to him by the bank. This deposit was not accompanied by any writing. In June, 1866, the Appellant applied to *Kennedy* for the payment of then outstanding advances, or for the deposit of farther securities, and on the 29th of June, 1866, *Kennedy* offered by letter to deposit with the Appellant the title deeds of the lands of *Marybrook, Dromore*, and other lands in the county of *Down* (part of *Lockhart's Quarter of Kinallen*), and handed to the Appellant one of these deeds, promising to procure the others from his residence in *Down*. He did shortly afterwards deliver to the Appellant a box of title deeds, which were examined by the Appellant's solicitors, who advised that farther deeds should be deposited. On the 6th of July, 1866, a letter signed by *J. B. Kennedy*, dated 29th of June, 1866, and addressed to *Copland* as managing director of the *Royal Bank*, was delivered to *Copland*. It was in the following terms :—" Sir—You at present hold as security for the overdraft on account, the lease of No. 50, *Dame Street, Dublin*, and ground at the rear. In addition to this lease, and in lieu of the other securities at present held, I lodge with you the deeds under which I hold the lands and house of *Marybrook*, county of *Down* (part of *Lockhart's Quarter of Kinallen*) and a

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farther interest out of other parts of *Lockhart's Quarter*." The deeds themselves were deposited on the 20th of July. This deposit of deeds was never made the subject of registry. On the 1st of August, 1866, *Kennedy* stopped payment; and on the 2nd of August presented his petition to the Court of Bankruptcy and Insolvency, pursuant to the provisions of the 20 & 21 Vict. c. 60 (*Ir.*)

On the 8th of August a meeting of *Kennedy* and his creditors took place, when it was agreed and resolved that he should, under the 33 Geo. 2, c. 14 (*Ir.*), and 40 Geo. 3, c. 22 (*Ir.*), vest all his real and personal estates, credits, and effects, in the Respondents as trustees under those Acts. This resolution was carried into effect by a deed dated the 27th of August, 1866, wherein he, the party of the first part, was described as of "No. 50, *Dame Street*, in the city of *Dublin*, banker." Under this deed the Respondents *Davies* and *O'Connor*, and one other person, *Moyes*, were appointed trustees. The deed was executed among others by the Appellant, as the representative of the *Royal Bank* (1).

The debts of *Kennedy* were described in the deed as amounting to £28,765, and the debts due to the *Royal Bank* not secured by the deposit of deeds, were stated to amount to £3911 and £6248. But these sums represented negotiable securities, which at the date of *Kennedy's* stopping payment were current, but which were afterwards, with the exception of a sum of £67, duly paid by the persons liable upon them. Different proceedings

(1) In June, 1867, the rights of the parties under this deed were brought under the consideration of the Landed Estates Court, the parties to the contention being the trustees under the deed of the 27th of August, 1866, on the one hand, and Messrs. *Brunker* and *Peebles*, two creditors of *Kennedy*, on the other. These gentlemen claimed a sum of £700 as due to them on a judgment obtained by them as trustees of the settlement executed upon *Kennedy's* marriage, and Mr. *Peebles* farther claimed £700 as advanced by him to *Kennedy* in May, 1859, upon the deposit of the title deeds of the lands, accompanied by a verbal agreement, but without any

writing. The case was heard before Judge *Dobbs*, who, on the 8th of July, 1867, decided the following points:— That the *Bankers Act*, 33 Geo. 2, c. 14 (*Ir.*) had not been repealed; that *Kennedy* was a banker within the meaning of that Act, though he had no licence to issue notes; that neither an equitable mortgage created by deposit of deeds alone, nor a mortgage judgment, was such a security as is excepted from the operation of that statute, and that such securities, if unregistered, gave the holders of them no priority over the general creditors: *Re Kennedy's Estate*, Ir. Law Rep. 1 Eq. 425.

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appeared to have been carried on under this trust deed, but on the 6th of April, 1867, *Kennedy* was, on the application of *Patrick Donegan*, duly adjudicated a bankrupt, and *Donegan* was appointed his trade assignee. Disputes still continuing as to the relative priorities of the general creditors under the trust deed, and of creditors who claimed to have preferential securities by way of deposits creating equitable mortgages, the creditors' trustees, now represented by the Respondents, in January, 1868, filed a bill in Chancery, making, among others, the Appellant a party thereto, for the purpose of administering *Kennedy's* estate under the provisions of the 33 Geo. 2, c. 14 (*Ir.*), and of having the rights of all parties formally declared.

The bill prayed that the trusts of the deed of the 27th of August, 1866, might be carried into execution, and the real and personal estate of *Kennedy* administered pursuant to the provisions of the 33 Geo. 2, c. 14 (*Ir.*), and for declarations that the Appellant and certain other creditors (with whom an equitable deposit of deeds had been made), were not entitled to priority as to the lands the subject of their deeds.

The Appellant put in his answer to this bill, and submitted that the Act 33 Geo. 2, c. 14 (*Ir.*), was no longer in force, but was inconsistent with, and repealed by, the effect of the provisions of the 20 & 21 Vict. c. 60, relating to bankruptcy in *Ireland*; and farther, that *Kennedy* was not "a banker" within the provisions of the statute of 33 Geo. 2, c. 14 (*Ir.*) nor was the Appellant, in respect of his equitable mortgage, "a creditor" of *Kennedy* within the meaning of the same Act. The Appellant farther contended that the deed of the 27th of August, 1866, was not a deed approved by the majority of creditors of *Kennedy*, and that the same was, therefore, void and inoperative as against the *Royal Bank*; that the equitable mortgages by deposit of deeds in May, 1864, and in July, 1866, were not, nor was either of them within the meaning of the 33 Geo. 2, c. 14 (*Ir.*), neither of them being capable of registry; and that the second of them, having regard to the date when it was effected (which was less than one month before *Kennedy* stopped payment), did not require to be registered under the said Act, and was not affected by want of registry, but that these equitable mortgages constituted valid securities

upon the property therein comprised, and entitled the mortgagees to priority.

The cause was heard before the Master of the Rolls, who, on the 12th of December, 1868, made a decree whereby he declared that the trusts of the indenture of the 27th of August, 1866, were to be carried into effect, that the estates, real and personal, of *Kennedy* were to be administered pursuant to the provisions of the 33 Geo. 2, c. 14 (*Ir.*), and that the trustees and other creditors of *Kennedy* who were such at the time he stopped payment, ought to be paid their demands out of his real and personal estate without regard to priority or preference other than as provided by that statute; and farther, that the debts claimed by the *Royal Bank of Ireland*, represented by *Copland*, as due and as secured by the equitable mortgages in the pleadings mentioned, were not debts secured by deed or conveyance registered pursuant to the provisions of the 33 Geo. 2, c. 14 (*Ir.*) and that the said *Royal Bank* had no right to priority or preference, by virtue of the said equitable mortgages respectively, in point of payment thereof, over the trustees and the other creditors of *Kennedy* (1).

The Appellant took the case to the Court of Appeal, where it was argued in April, 1869, and on the 15th of June the appeal was dismissed and the decree affirmed (2), the Lord Chancellor *O'Hagan* agreeing on all points with the Master of the Rolls, the Lord Justice *Christian* differing from him on one point, namely, that of the meaning of 33 Geo. 2, c. 14 (*Ir.*), which he held to be confined to bankers who issue notes (3). The case was then brought up by appeal to this House.

(1) *Ir. Law Rep.* 3 Eq. 31, *nom.*
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(2) *Ibid.* 668.

(3) The Acts of Parliament, on the words of which the decision of this case depended, are (as far as is material here) thus expressed:—

The 8 Geo. 1, c. 14 (*Ir.*) intituled “An Act for the better securing the Payment of Bankers’ Notes,” recites that “The trade of this kingdom is partly carried on by the means of cash notes given by bankers,” and that it is

necessary to secure payment of the same, and speaks of persons “issuing out promissory notes for the payment of money so deposited on demand,” and in its subsequent provisions speaks of “such bankers” who do not pay “such notes upon demand, when the same is or shall become due,” and declares that “such banker, or person or persons, so making default” shall be liable to pay not only the sums due “on such note or notes,” but also legal interest from the time of the demand.

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Sir *R. Palmer*, Q.C., and Mr. *Rendall*, for the Appellant:—

The rights of the Appellant are valid under the deposit of deeds made to him by *Kennedy*, and are not affected by the trust deed

The 33 Geo. 2, c. 14 (*Ir.*) is intitled “An Act for repealing the 8 Geo. 1, c. 14, intitled ‘An Act for the better securing the Payment of Bankers’ Notes,’ and for providing a more effectual Remedy for the Security and Payment of Debts due by Bankers.” It recites that trade is chiefly “carried on by promissory notes and accountable receipts given by bankers, and the currency of these notes will be promoted by giving a more effectual security to the creditors of such bankers than they have at present.”

It then recites the Act of Geo. 1, declares that it has “not sufficiently provided for the security of such creditors,” and then repeals the Act, and directs that nothing contained in the said Act “shall in any sort obstruct or impede the operation of all or any of the clauses herein contained.”

Sect. 2. “All deeds and conveyances made by *any banker or bankers* before the 1st of August, 1760, whereby any real estate, &c., shall be granted” &c., “which shall not be registered and enrolled pursuant to the directions in the said recited Act shall be deemed fraudulent and void against all creditors of *such banker and bankers*,” and that all deeds, and conveyances “executed after the 1st of August, 1760, by *any banker or bankers*,” whereby any part of their real estate or leasehold interest “shall be mortgaged, incumbered, or affected,” shall be duly registered in the office for the public registry of all deeds within one calendar month from the time of the execution thereof as aforesaid by such banker or bankers, and that for want of such registry every such deed and convey-

ance as aforesaid shall be deemed fraudulent and void against all and every creditor of such banker and bankers, though made or given for valuable consideration.

Sect. 3 enacts that “all grants, sales, alienations, &c.,” made by “*any banker* during the time he continues a banker,” of any part of his real estate in trust for a child, &c., shall be utterly void as against creditors, though given for valuable consideration.

Sect. 4 enacts, “that *no banker or bankers*” shall, after the 10th of May, 1760, “give any note, negotiable receipt, or accountable receipt,” with any promise for the payment of interest and that “all notes and receipts by any banker or bankers with such promise or engagement for the payment of interest shall be absolutely null and void.”

Sect. 5 makes “*any banker or bankers*” not paying their notes or negotiable receipts or accountable receipts issued or given by him or them” upon demand, liable to pay interest from the time of demand.

Sect. 6. Receipts or discharges by “*any banker or bankers*,” after stopping payment, shall be void; so shall conveyances “*by any banker*” made after he has absconded or stopped payment, though made for valuable consideration.

Sect. 7. “The persons of *all bankers*” who stop payment between the 15th of April and the 21st of June, 1760, who have vested their estates in trustees for the payment of debts, free from arrest till March, 1762.

Sect. 8. After “*any banker*” shall abscond or conceal himself, or stop payment, or die, all his effects, real and

executed in August, 1866, under which the Respondents claim. For, first, the 32 Geo. 2, c. 14 (*Ir.*) is repealed, if not entirely, at least so far as relates to bankers who stop payment and become bankrupt, even though it may not be repealed as to those who stop payment but do not become bankrupt. Secondly, if it is not repealed, then it only applies to bankers who have received licences to issue notes and carry on banks of issue. Thirdly, equitable mortgages by deposit of deeds are not capable of being registered under the 33 Geo. 2 c. 14 (*Ir.*), and therefore the want of registration will not affect them. Fourthly, if it should be thought that the writing accompanying the deposit of deeds in this case was something which could be registered, and which required registration, then the answer is, that the month within which the equitable mortgagee was allowed to register had not elapsed when *Kennedy* stopped

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personal, are to be liable for his debts without regard to priority, "other than and except such debts and incumbrances as shall be secured by deeds or conveyances registered as aforesaid." These are to have force and effect "as if this Act had not been made."

Sect. 10. "Where *any banker or bankers*," having "stopped payment," shall within three months next after such stopping of payment by any deed or deeds, vest his or their whole real or personal estates," &c., in one or more trustees for the payment of all debts, "such deed or deeds shall be valid and effectual to all intents and purposes," the estates shall stand vested in the trustees, and "*the banker or bankers* be freed and discharged" from their debts, "such debts only excepted as are by this Act entitled to a preference before other debts."

Sect. 11 enacts, "That in all such deeds to be executed by such banker or bankers after the 20th of April, 1760, the trustee or trustees therein named shall be approved of by the majority in value of the creditors of such banker or bankers, or by the Lord

Chancellor, or the Commissioners of the Great Seal, or the Commissioners for hearing causes in the Court of Chancery for the time being."

The 13th section provided "that all promissory notes issued by any bank shall be paid before any receipt given or issued out of such bank."

40 Geo. 3, c. 22 (*Ir.*) recites 33 Geo. 2, and that no provision is thereby made for the safety of bankers' persons who might stop payment after the 5th of March, 1762. It then enacts that bankers who have stopped payment since the 1st of April, 1793, or may hereafter stop payment, shall be free from arrests and executions provided they vest their property in trustees for the payment of all their debts "pursuant to the recited Act," but it provides that no banker "shall be entitled to the benefit allowed by this Act unless the trustees in such deed named, or the major part of them, shall in writing under their hands and seals certify to the Lord Chancellor," &c., "that such banker hath in all things conformed himself to the directions" of the 33 Geo. 2, &c.

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payment, and consequently the want of registration could not affect the mortgage. And fifthly, the trust deed of August, 1867, is itself bad, not having received the approval of a majority in value of the creditors, according to the provisions of the statute under which it assumed to be executed.

The provisions of the 33 Geo. 2, c. 14 (*Ir.*) are best explained by a reference to the previous statute, 8 Geo. 1, c. 14 (*Ir.*). That statute reciting that the trade of the country was in great measure carried on by notes payable on demand, and that it was necessary to make provision for rendering them secure, provided that any person carrying on the trade or calling of a banker who issued out notes for the payment of money on demand should be liable to be dealt with in a particular manner. This statute was itself repealed by the 33 Geo. 2, c. 14 (*Ir.*), but its provisions were re-enacted, and others were added to them. The preamble and enactments of the later statute recited and were similar to those of the statute which had preceded it, and the two statutes only differed from each other because of the fact that the later embraced a greater number of subjects than did the earlier one, and treated them in a somewhat different manner. The purpose, however, was the same in both, and both alike related to banks of issue. Now, as *Kennedy* never obtained a licence to carry on the business of a bank of issue, and could not issue a note without such licence, the statute of Geo. 2 cannot apply to him. Lord Justice *Christian* (1) was clearly of that opinion, thinking that the plain object and intention of the Legislature had been, in the statutes 8 Geo. 1 and 33 Geo. 2, directed to persons carrying on the business of banks of issue, and to them alone. He considered that the case of *Stafford v. Henry* (2) justified that view of the matter; and he adopted, as a principle of construction, that which was stated by Sir *John Leach* in *Emanuel v. Constable* (3), where general words in the enacting part of one statute were restrained by reference to its preamble, that preamble itself dealing with the provisions of a previous statute. The 25 Geo. 2, c. 6, had declared that when “any person shall attest any will or codicil to whom any beneficial devise, &c., affecting any real or personal estate shall be thereby given,” such gift shall be void;

(1) *Ir. Law Rep.* 3 Eq. 691, *et seq.*

(2) 12 *Ir. Eq. Rep.* 400.

(3) 3 *Russ.* 436.

but Sir *John Leach*—observing that the statute of Geo. 2 recited the *Statute of Frauds*, and then appeared to make its own enactments supplementary to that statute, indicating in that way the special intention of the Legislature—held that the 25 Geo. 2, c. 6, did not extend to wills of personal estate only, and declared that the words “any will or codicil” in the statute of Geo. 2, must throughout that statute be read with reference to the recited statute, “any *such* will or codicil.” *Hawkins v. Gathercole* (1), and *Salkeld v. Johnston* (2) are cases to the same effect. The rule thus adopted in those cases, which was to give effect to particular words though they appeared to be inconsistent with a general intent, must be applied to the present. The 33 Geo. 2 must be taken to apply to the same matters to which the 8 Geo. 1 applied, and then *Kennedy* must be treated as a person not coming within their provisions.

The 33 Geo. 2 has (at all events partially, if not entirely) been repealed. It was repealed by the effect of the first *Irish Bankruptcy Act*, 11 & 12 Geo. 3 (and then by the 40 Geo. 3, c. 22 (*Ir.*), which superseded it), and the rules of the bankrupt law substituted for its own. Such was the opinion expressed by Lord *St. Leonards*, in *O’Flaherty v. McDowell* (3). He said (4): “Every provision of the 11 & 12 Geo. 3 is, in my opinion, in direct conflict with the Act 33 Geo. 2.” So that though its repeal had not been in terms declared, it had been in fact effected, because the provisions of the statutes were inconsistent with each other. The 33 Geo. 2 had subjected all the property of persons trading as bankers to liability to their creditors in respect of the notes they had issued; so that every deed which a man, being a banker, had executed affecting his property, was, unless enrolled within a specified time, void as against his creditors; and it was so although made for a valuable consideration, and with perfect good faith. The object of the Legislature had been to give the greatest possible security to the holders of notes issued by bankers. These were special provisions applicable only to bankers who were carrying on business in the way of banks of issue, so that even if the 33 Geo. 2 was still unrepealed it could not apply to *Kennedy*, for, if a banker at all,

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(1) 6 De G. M. & G. 1; see *per*  
 L. J. Turner, 21. *per* *MS 486*

(2) 1 Hare, 196.

(3) 6 H. L. C. 142.

(4) 6 H. L. C. 166.

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he had never kept a bank of issue. But, in fact, the 33 Geo. 2, c. 14 (*Ir.*) was repealed by the 11 & 12 Geo. 3, c. 8 (*Ir.*). This latter provided a general bankrupt law for *Ireland*, and made bankers, by name, subject to that law. On any persons in trade, including bankers, committing an act of bankruptcy, it made their property, real and personal, at once liable to the payment of their debts, and for that purpose vested it in their assignees; admitting, however, certain alienations of their property previously made, *bonâ fide*, to be protected against this general operation of the law. This Bankruptcy Act also protected purchasers for valuable consideration and *bonâ fide* settlements and conveyances, without notice, which was in direct conflict with the former statute. Its provisions were, therefore, entirely in opposition to those of 33 Geo. 2; and as the provisions of the two statutes were thus in conflict, the rule applied that those of the later statute must prevail. Those of the earlier Act must consequently be treated as repealed. The case of *Hayden v. Carroll* (1) had been relied on in the Court below, to shew that the 11 Geo. 3 did not repeal the 33 Geo. 2, Lord *Clare* having expressed an opinion to that effect in the House of Lords in *Ireland*; but that opinion was examined in this House by Lord *St. Leonards*, in *O'Flaherty v. McDowell* (2), and shewn to be erroneous; and Lord *St. Leonards* there distinctly declared that, "If a man was made a bankrupt under the common Bankruptcy Act, it would be impossible to say that he could be at all bound by the provisions of the 33 Geo. 2." In *Fawcett v. Hodges* (3) it had also been said that the 33 Geo. 2 was still an unrepealed statute, but that case cannot affect the present, for it was distinctly overruled in this House in *O'Flaherty v. McDowell* (4).

The bankruptcy law which is now in force in *Ireland*, 20 & 21 Vict. c. 60, has superseded all the early Irish Bankruptcy Acts, but it does not contradict, it has applied and extended them. That law must be taken to apply here, and it leaves the rights of the Appellant under these equitable mortgages untouched. These equitable mortgages constituting, as they did, a dealing and transaction with the bankrupt *bonâ fide* entered into before the date

(1) 3 Ridg. P. C. 545.

(2) 6 H. L. C. 167, *et seq.*

(3) 3 Ir. Eq. Rep. 232.

(4) 6 H. L. C. 142.

and issuing of the commission, are, under the 6 Will. 4, c. 14, s. 95, perfectly valid, "notwithstanding any prior act of bankruptcy by him committed," and cannot now be impeached. That statute has been repealed by the 20 & 21 Vict. c. 60, which, however, substantially re-enacts it, and thus sect. 95 of the earlier statute is, in fact, replaced by sect. 328 of the later statute, which only differs as to this matter from its predecessor by more extensively validating such transactions.

But, farther, if the provisions of the 33 Geo. 2, c. 14, are still considered to be in force so as to require the registry of conveyances executed by any banker whatever, then the answer in this case is, that those provisions cannot apply when there has been no execution of any deed, but a mere deposit of existing deeds, creating an equitable mortgage alone. Such a deposit is incapable of being registered under the Act. There is nothing to register. In the Landed Estates Court a great mistake was made; it was admitted that there could be no register of a mere deposit (1), but it was nevertheless said that under the effect of the Bankers Acts (which there were held to be in force and applicable), the whole transaction was void as to the creditors, for that "If they ought to be registered they have not been so—and if they could not, they have no priority;" and so the lands, which had been made the subject of equitable mortgage, were held to be vested in the trustees under the creditors' deed. That holding was erroneous; neither the 2nd nor the 8th section of the 33 Geo. 2 touches such a case as this; it was a matter wholly unprovided for, and being so, the statute can have no effect upon it.

Then, if the memorandum is treated as a conveyance, and so capable of registration, and therefore requiring registration, the answer is that *Kennedy* stopped payment within one month after it was deposited with the bank.

The period of one month must be measured not from the date put upon the paper, for any date put upon a paper cannot be allowed to affect the rights of a person who cannot control the putting of it there, and who may know nothing whatever of it, but from the time when the delivery of the paper to him gives him full knowledge of it so as to bind him by that knowledge. In this case

(1) *Re Kennedy's Estate*, Ir. Law Rep. 1 Eq. 425, 430.

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the date of the memorandum must be taken as the 6th of July; *Kennedy* stopped payment on the 1st of August; a calendar month, given by the statute as the time for registering the conveyance, had not therefore elapsed before the stoppage of payment, and after that its registration became unnecessary. In no way, therefore, can the absence of registration affect its validity. The equitable mortgage was itself perfectly good, and what happened afterwards could not invalidate it: *Beavan v. Oxford* (1); *Shaw v. Neale* (2).

In *Sumpter v. Cooper* (3) a creditor was held entitled to retain the rents of houses under an equitable mortgage by deposit, *bonâ fide* made by his debtor, though a written assignment of the same houses afterwards made by the debtor was, under the statute 7 Ann. c. 20, held void for want of registration. *Neve v. Pennell* (4) is to the same effect. Here the Lord Chancellor of *Ireland* himself admitted (5) that these securities were incapable of being registered; if so, they cannot be affected by the absence of registration, are untouched by the statute of Geo. 2, and are valid securities under the Bankruptcy Acts.

Lastly, the trust deed could only pass to the trustees the property which remained in the debtor when he executed it, and all that was the subject of this equitable mortgage had, before then, passed out of him, and was vested in the Appellant, and farther, the trust deed was itself invalid, not having been duly approved by a majority in value of the creditors. Its effect is also destroyed by the bankruptcy; for bankruptcy following upon the trust deed, and the general law of bankruptcy furnishing the rules for the distribution of the bankrupt's property, a trust deed (especially one not executed strictly according to the provisions of the statute), which would distribute them in a different manner, cannot have any effect.

The *Solicitor-General* (Sir G. Jessel), and Mr. *Peter Martin* (of the Irish Bar), for the Respondents:—

The cases referred to do not warrant the contention that the 33 Geo. 2, c. 14 (*Ir.*) is repealed. Where there are subsequent sta-

(1) 6 De G. M. & G. 492. *Im R. S. 111* (3) 2 B. & Ad. 223.

(2) 6 H. L. C. 581. *Im R. S. 145* (4) 2 H. & M. 170.

(5) *Ir. Law Rep.* 3 Eq. 689.

tutes which, treating of the same matters as statutes which have preceded them, make other different and opposing enactments respecting those particular matters, then, of course, the earlier enactments must be considered as so far repealed. But where the two sets of enactments treat not only of the same but of different matters, are capable of being read together, have the same object in view, and do not contradict but rather assist each other, the later working out more extensively the purpose of the earlier statute, there is no ground for any argument as to the repeal of the one by the other. They must stand together. This was the opinion of Lord *Clare* in the Irish House of Lords in *Hayden v. Carroll* (1), and that was substantially admitted by Lord *St. Leonards* in *O'Flaherty v. M'Dowell* (2). In fact, his Lordship there only suggested a partial repeal of the 33 Geo. 2, while Lord *Wensleydale* in that same case, distinctly declared that the 33 Geo. 2, c. 14, was not repealed by the 11 & 12 Geo. 3, c. 8 (2). The statute has been treated as still in force in a great many cases: *Lord Clancarty v. Latouche* (3); *Re Anderson* (4), which latter is a strong case, for there an attempt was made to make money bonds the subject of registration under the Act, but the Court held that bonds were not deeds whereby lands were affected, and therefore did not require to be registered pursuant to the provisions of the 33 Geo. 2, c. 14. If they had been deeds of that kind they must have been registered. It is impossible to have a stronger instance of the recognition of the existence of the statute. *Spearing v. Delacour* (5) is to the same effect. The statute of Geo. 2 is really sustained and enforced by the operation of the 40 Geo. 3, c. 22 (*Ir.*), and its continued existence has been distinctly recognised in different statutes. Thus the 47 Geo. 3, c. 74, s. 2, expressly declares that nothing in that Act shall be taken to repeal the 32 Geo. 2, c. 14, and the 13th section of the 11 Geo. 4, c. 47, makes the same declaration, while the 8 & 9 Vict. c. 37, s. 4, treats the whole statute as one still in full force, but repeals the 15th section of it so far as that section prohibits public officers from being partners in banks.

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(1) 3 Ridg. P. C. 545.

(3) 1 Ball. & B. 420, 429.

(2) 6 H. L. C. 142.

(4) Cooke & Alcock, 1.

(5) 1 D. & Wal. 591-595.

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The opinion of Lord *St. Leonards*, in *O'Flaherty v. M'Dowell* (1), did not go to the extent now contended; but if the single *dictum* that the two Acts, 33 Geo. 2 and 11 Geo. 3, are in "direct conflict" with each other, is to be relied on, so as to found the argument that the later repealed the earlier statute, then an equally strong and a more clearly expressed *dictum*, that of Lord *Wensleydale*, uttered in the same case, can be opposed to it. Lord *Wensleydale* said (2): "The statute of Geo. 2 is certainly not repealed, but is, I conceive, in force as to bankers;" and his Lordship then noticed the statutes already referred to, which had recognised its existence, and added: "It continues in force therefore for some purposes," by which he meant for all purposes other than those which had been made the subject of express repeal. It is consequently in force for all the purposes affecting this case, for as to none of those purposes has there been directly or indirectly any repeal of it.

The debt claimed by the Appellant is not a debt or incumbrance secured by deed, so as to be protected under the Irish Bankruptcy Act, for no deed has been registered under the 33 Geo. 2, c. 14 (*Ir.*) Taking the memorandum which accompanied the second deposit of deeds as a "conveyance," then that has not been registered; and assuming as a fact that it was not delivered till the 6th of July, and that the stoppage of payment took place within one month afterwards, these things afford no excuse for the non-registration. The statute declares that a deed or conveyance not registered shall be void as against creditors, and that positive enactment is not in any way restricted in its operation by the subsequent happening of a bankruptcy. There can be no priority given to this unregistered equitable mortgage. Not being registered it is of no validity as against the creditors of the bankrupt, all whose estate of whatever kind is vested in the trustees appointed under the deed of the 27th of July. Under that deed a trust at once attached by force of the statute upon all his property, real and personal.

The words of the 33 Geo. 2, c. 14, cannot be restricted to persons who carry on the business of banks of issue. It is true that that statute recites the 8 Geo. 1, and deals with such persons;

(1) 6 H. L. C. 142. *4 June 45* (2) 6 H. L. C. 182. *4 June 45 99*  
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but it also has many new and additional enactments, and deals with persons who carry on the trade of banking without regard to whether their banks are banks of issue or not. There are some sections which may be applicable to banks of issue alone, but there are many which are as general in their application as language can make them, and refer to all banks and bankers whatever. The case of *Emanuel v. Constable* (1) has no application to the present, for there the 25 Geo. 2 was avowedly passed for no other purpose but to give greater effect to the provisions of the *Statute of Frauds*. For similar reasons the cases of *Salkeld v. Johnston* (2) and *Hawkins v. Gathercole* (3) are inapplicable.

Assuming that the statute is in force, and that the words apply to a banker, without being restricted to one who issues notes, then it is clear that *Kennedy* was a banker, and his case falls within the statutory provisions. The facts of the case in *Stafford v. Henry* (4) were sufficient to justify the decision that the trader there was not a banker, but that circumstance got rid of the necessity of deciding the other question, as to the exclusive applicability of the statute to bankers who issue notes, and the utmost that can be said of that case is, that on a point which it was not necessary to decide the learned Judges declined to give any positive opinion.

The security is to be void if not registered. Here there are two words in the statute, "deed" and "conveyance." The memorandum here constituted a "conveyance," and ought to have been registered. For want of that it is void as against creditors. It may not be absolutely void, but void as against creditors; that is to say, it gives no priority whatever over general creditors, to the person in whose favour it has been executed. The first deposit here was got rid of, and a conveyance by deed was effected when the second deposit with the memorandum was made. It had the same effect as if there had originally been a promise to execute a mortgage, and after that a mortgage had been executed: *Re Hamilton's Estate* (5). Having promised to execute a mortgage by deposit, had *Kennedy* refused to perform his promise Equity would have

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(1) 3 Russ. 436.

(2) 1 Hare, 196.

(3) 6 De G. M. & G. 1.

(4) 12 Ir. Eq. Rep. 400.

(5) 9 Ir. Ch. Rep. 512.

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compelled him to perform it. The execution of that promise operated as a conveyance. It ought to have been registered, and the want of registry deprived it of all priority.

Why was it not registered? The statute required it to be registered within one month. It was dated on the 29th of June. Before the 1st of August the month had expired. But the Appellant contended that as the deed did not come to him till the 6th of July, the month for registration was to be calculated from that time. That was not so. The month must be taken from the date of the execution of the deed. It was the execution of the deed, according to the very words of the statute, not the handing it over, which gave the date for the registration. But even if that was not so, the Act did not say you shall not register till the expiration of a month, but that the deed shall be registered within the month or it shall be void. Here it has not been registered at all.

Lastly, as to the approval of the trust deed by a majority of the creditors. The clause requiring approval is directory only, and if the creditors should not give their approval, the Lord Chancellor may do so, and there is no time fixed within which his approval must be given. But besides that, the trust deed was, as a matter of fact, approved by a majority of the creditors.

Sir *R. Palmer* replied.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, in this case there is an appeal from a decision of the Master of the Rolls in *Ireland*, affirmed upon appeal from him to the Lord Chancellor and the Lord Justice. The Lord Chancellor and the Lord Justice differed in opinion upon the subject, and the matter which now is brought for your Lordships' consideration is this, whether or not the deposit with the Appellant of certain title deeds relating to leasehold and freehold estates of a Mr. *Kennedy*, carrying on the business of a banker, is effectual to give the Appellant security to a very considerable extent over the property comprised in those deeds, as against a proceeding which has taken place under the Act peculiar to *Ireland*, called the *Bankers Act*, whereby the Respondents, the trustees, under a certain deed executed under that Act, claim to retain possession of the whole estate of Mr. *Kennedy* (including those estates comprised in the

deeds so deposited), without preference being allowed to the Appellant in respect of any portion of the debt due to the *Royal Bank of Ireland*, of which he is the representative.

The ground taken by the Respondents is simply this, that by the Act 33 Geo. 2, c. 14 (*Ir.*), called the *Bankers Act*, the trustees are in possession of all the property for the benefit of all creditors. The Appellant says that that, for several reasons, is not so, the first reason being one which strikes at the Act 33 Geo. 2 itself. He says: In the first place it was never intended to apply to a case similar to that of Mr. *Kennedy* at all, it was intended to apply only to banks of issue, that is to say, banks which issue notes to circulate in the country; and that the bankers mentioned in the Act are only those bankers who have banks of issue. With regard to Mr. *Kennedy*, it is not disputed that he was a banker in the ordinary sense of the word, as receiving people's moneys and giving them receipts—receipts not as for transfers of property, or for anything of that kind, but receipts acknowledging the receipt of money, and issuing pass books and cheque books, and dealing with them in the ordinary way of a banker; that in every other sense he was a banker, but not in the sense of issuing notes for circulation. The Appellant says, in the first place, that the Act was not intended to apply to such a case as this at all, because *Kennedy* did not issue notes for circulation.

And, secondly, the Appellant says that if the Act was ever intended to have this application as regards the case of Mr. *Kennedy*, the Act itself is superseded by several Acts which have since been passed; and that, consequently, the property is not to be dealt with under the trust deed executed under the *Bankers Act* of Geo. 2; but that if it is dealt with at all it must be dealt with in bankruptcy. These two objections strike at the very foundation of the claim of the Respondents being maintained, and put the Act of the 33 Geo. 2 entirely out of the way.

But, thirdly, the Appellant says, if this is not so, and if the Act would be applicable to Mr. *Kennedy*, and is not superseded by the proceedings that have taken place in bankruptcy, still the Act does not affect me. The Act is directed solely against debts which are secured by instruments which could be susceptible of registration; but the security I hold was not one susceptible of registra-

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tion; and that being the case, my security still remains a good and valid security, not being avoided by any direct expression in in the Act, and not by construction falling under the purview of the section which vests the whole property of the banker in the trustees under the creditors' deed.

And then, lastly, the Appellant says, supposing all those points to be decided against me, yet there remains the objection that the trust deed which has been executed, and which is alleged to have vested the estate of the banker in the Respondents, the trustees, for the purpose of being distributed among his creditors, was in itself an improperly executed deed; it could not be effective unless it had received the sanction (by virtue of the 33 Geo. 2 itself) of the major part of the creditors of the banker, and it has not received the assent of the major part of them. It remains, therefore, an instrument not properly executed under that Act. This, again, would bring the question under the control of bankruptcy, and into administration under bankruptcy; because, being a deed by which the whole property of the banker was transferred to these trustees, the Respondents, it was in itself an act of bankruptcy not protected by the Bankruptcy Act, by reason of the formalities required by the Act not having been complied with, and that the estate was thereby subjected to administration in bankruptcy, and not under the provisions of the *Bankers Act*.

Now, my Lords, in this contention, the Appellant has been supported in one point, and that a very material point, namely, the applicability of the Act at all, by the judgment of Lord Justice *Christian* in the Court below. That learned Judge was of opinion that the Act of 33 Geo. 2, did not apply to Mr. *Kennedy's* case, inasmuch as Mr. *Kennedy* was not a banker issuing notes for circulation. Now, taking that point as the first point which has been here raised, and remarking that with that exception there has been a singular uniformity of judgment in the Court below in the various processes by which the question has been raised between these and other parties, I proceed to consider how far the opinion of Lord Justice *Christian* is well founded in law.

I will just mention, before taking up that point, very briefly what has occurred with reference to the decision of this question. The very question now at issue has been raised as between other

claimants claiming in a similar manner on security, in the way of deposit. This very question has been raised in the Landed Estates Court with regard to the distribution of the proceeds of sale there (1). And in the Landed Estates Court it was decided in favour of the present Respondents, the Defendant in that case being a Mr. *Peebles*. Subsequently, it was thought desirable that a bill should be filed to raise the whole question more completely with regard to all persons claiming to be interested in questions of this character. A bill was accordingly filed in this case which is now before us. The Plaintiffs in that bill are the Respondents in the present case. The decision was in their favour by the Master of the Rolls (2), and the Lord Chancellor of *Ireland* has concurred in that decision (3); the Lord Justice *Christian* differed from him upon the ground that I have stated, and apparently upon that ground alone.

With regard to the question as to whether or not the Act of 33 Geo. 2 applies to a banker, such as Mr. *Kennedy*, the argument stands thus: a previous Act of *George I.* (8 Geo. 1, c. 14 (*Ir.*)) had recited that mischief had accrued from the failure of banks of issue, which had spread considerable ruin and misfortune among a large class of persons; and it proceeded to enact certain very strict provisions with regard to those banks of issue, and used expressions which, throughout the greater part of that Act, appear to relate to banks of issue, and to banks of issue only. It is not quite so, however, even in that Act, because there are sections which relate to bankers generally, and are not connected even by the word "such," as a word of reference, with the previous sections of the statute or the preamble, but which use the term "bankers" only. I do not think I need make any farther remarks upon that Act, because this Act of Geo. 2 seems to be plain and explicit in its sections as relating to all bankers. It is quite true that it recites the previous Act of Geo. 1. It recites that whereas the trade and manufacture of the kingdom was in a great degree carried on and supported by means of promissory notes and by accountable receipts given by bankers, upon the credit of such bankers, and the currency of their notes; and whereas it is necessary to give more effectual security to such

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(1) *In the Matter of James Birch Kennedy and his Trustees*, Ir. Law Rep. 1 Eq. 425.

(2) Ir. Law. Rep. 3 Eq. 31.

(3) *Ibid.* 668.



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creditors, and so on. Then it recites the previous Act, and then, when it comes to the enacting part, it says this explicitly, without any words whatever by which you can confine it to banks of issue: "Be it enacted that all persons carrying on the trade or calling of a banker" (that was the expression), and so it goes on; and in the subsequent clause it says: "Be it farther enacted by the authority aforesaid, that all deeds and conveyances" (which form the subject of the question we have at present to consider), are to be null and void, unless they are executed in a particular manner. But the expression used in the Act, is—"All persons carrying on the trade, business, or calling of a banker." That is the expression which is used throughout the Act. There is nothing in the Act to confine it to bankers issuing notes only, though, undoubtedly, the mischief would be greater with regard to all persons making use of banks of deposit upon the failure of one which was also a bank issuing notes. That is a matter which is thought in all countries to be productive of the most disastrous consequences to commerce. The evil to be struck at was an evil which in itself was applicable to all persons taking the money of others and making themselves accountable for it on demand. Unless we were absolutely obliged by the structure of this Act to do so, it would be impossible, I think, to reason in this way, to say, that because the Act of *George I.* struck at banks of issue (supposing that to be the case), and the Act of 33 Geo. 2 is to be taken to be as having been enacted in aid of that Act, therefore, when a general expression is used in the later Act it is to be referred only to the particular grievance which is mentioned in the former Act, and is not to be extended to the whole class of persons to whom the words of the later Act itself clearly and sufficiently apply.

That being so, my Lords, I proceed in the next place to consider the second point raised by the Appellant, whether or not this Act has been superseded by the Acts with regard to bankruptcy which subsequently followed; and upon that question a great deal of argument was used before us in the hearing of this case founded upon some observations in a case which came before your Lordships' House in 1857 (1), in which Lord *St. Leonards* pointed out

(1) *O'Flaherty v. McDowell*, 6 H. L. C. 142. *4 June 1857*

that some of the provisions which occur in this Act of Geo. 2 seem hardly capable of standing together with clauses which are to be found in the Bankruptcy Acts, the 12 and 40 Geo. 3, which succeeded, which clauses are found in the subsequent Acts of Bankruptcy down to the present time. Some observations were made then tending to throw some doubt as to how far and to what extent the Acts can stand together. But there is an argument upon that part of the case which seems to me at once to destroy every conclusion sought to be raised from the apparent inconsistency (if inconsistency it be), of the two Acts, namely, that this Act which I am now considering, the 33 Geo. 2, though it was in some respects an Act of temporary provisions, is recited in the *Bankruptcy Act*, the 40 Geo. 3, which was an Act expressly continuing, though in some respects modifying, the provisions of the *Bankers Act*, the 33 Geo. 2. But to suppose that an Act of that kind in continuing any of the provisions of a former Act would have modified others, if there had been the least intention on the part of the Legislature by a previous Act to supersede the provisions of the first Act, is a supposition which appears to me to be entirely inconsistent with any possible reasoning upon the subject; and therefore the fact, as it appears to me, of the last Act subsequently continuing the earliest Act, is quite sufficient to answer any supposed inconsistency (if any such there be, which I am not by any means convinced that there is), or any difficulties which arise in modelling the rights of creditors under these various Acts.

Great reliance was placed upon this—that whereas the Act of 33 Geo. 2 comes into operation in certain events only, namely, in the case of absconding or stopping payment upon the part of the banker; as the *Bankruptcy Act* goes beyond that, and requires that an act of bankruptcy should be committed, it was supposed that it might be sufficient to confine the operation of this Act to all cases in which stopping payment had occurred during the period when the stopping payment should render it necessary that the provisions of the Act should be had recourse to; and that when bankruptcy subsequently took place in consequence of an act of bankruptcy it would be right to stop farther proceedings under the Act of 33 Geo. 2, in order to give effect to the proceedings in bankruptcy. But that appears to me to be one of the

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wildest intentions that could be imputed to the Legislature. It supposed that, after provisions have been carefully made by this Act for carrying out the distribution of the whole estate of the bankrupt so stopping payment, provisions going beyond the ordinary provisions of the *Bankruptcy Act* with regard to the avoidance of certain securities and deeds, that thereupon, upon a subsequent bankruptcy taking place (a matter which was extremely likely to occur with regard to a person stopping payment), the whole interest in the estate should be transferred to a different mode of administration carried out in some respects on different principles under the *Bankruptcy Act*. I cannot believe that such was the intention of the Legislature. It appears to me, therefore, that this Act is to be considered as valid and in force, and as applicable to the case of Mr. *Kennedy*.

Then, my Lords, the next point we have to consider is, what is the position of the Appellant with regard to the rights which he supposes himself to have acquired indefeasibly by virtue of the deposit made to him? Now the case as to the deposit stands thus:—The original deposit made with the Appellant was of certain title deeds relating to a house in *Dublin*, without any accompanying memorandum whatever. That was a deposit of deeds as a security for the then current balance. At a subsequent time, in the year 1866, not long before the stopping payment, some farther deeds were sent relating to the freehold property of Mr. *Kennedy* in the county of *Down*, together with a letter dated the 29th of June, 1866, which is said not to have been delivered till the 6th of July. I do not think it is very material to inquire whether it was delivered at its date or not, but I assume it not to have been delivered, together with the deeds, until the 6th of July, 1866. It is dated the 29th of June; it is addressed to the Appellant, who was manager of the bank; and it is in these words:—[His Lordship read it (1)] Now this instrument unquestionably was an instrument which, by its very words, gave security “in addition” to the other deeds deposited. It is a memorandum giving security over both the leasehold and the freehold, because it is “in addition to” the first security, and the Appellant is to hold both together as security for the overdraft account. That being so, the question now is,

(1) See *ante*, p. 360.

the banker having stopped payment within a month of the deposit of that instrument, namely, on the 1st or 2nd of August, "If he brought himself within the Act by the stoppage of payment, what is the effect of the provisions of the Act?" The second provision in the Act annuls all deeds or conveyances which are not registered within a month after their execution, as against all subsequent creditors. That provision, therefore, would at once annihilate everything that could fall properly under the term "deed or conveyance," and take it out of the way with regard to all subsequent creditors. Then there is a subsequent provision, the 8th, and there are several other provisions which I need not speak of at the present time, with regard to making provision by settlement for children, and the like, which are struck at more severely than the preceding securities. Then, by the 8th section it is enacted, from and immediately after the time when any banker shall have stopped payment, all the estate, whether for lives, or in fee simple or fee tail, and all other estates (except certain leases which are specified) of which he shall be seised or possessed or entitled to at the time of his stopping payment, shall be subject to the payment of all and every his debts, of what nature or kind soever, without regard to any priority or preference, and so on. And they shall be paid without regard to any debt which is not secured by a deed or conveyance registered as aforesaid.

Now, the argument which has arisen upon that part of the case is one which no doubt requires much consideration. The Appellant put it thus: This deposit of title deeds not being a matter that could be registered, is not within the section which directs that all securities shall be void which are not registered within a given time. The security, therefore, has not been put out of the way and rendered absolutely void because it could not be registered. Then he says that, by the subsequent 8th clause, the instrument not having been avoided, and this charge being found to be existing upon the estate, the subsequent clause only conveyed all the estate of the banker—all his property, of what kind soever; but that which he had parted with, which he had created a lien upon to the extent of a debt, is not his, and the deposit of the title deeds of that portion of his estate not having been avoided, that security which he has so created upon his estate in my favour is no longer his

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estate, but mine to the extent of his liability to me, and therefore is not included within the words of the section, which transfers all the estate of the bankrupt free from all debts other than those which are secured by such registered instrument as before mentioned. No doubt there are English authorities, which are very familiar to us, by which general charges and general words conveying estates or property have been held to be subject to liens which have been previously created. General charges, such as by assignment in bankruptcy, or by judgment against the debtor, have been held only to pass that which the debtor might have under his control at the time when the transfer took place.

But, in the first place, I think it would be a narrow construction of this Act to apply that doctrine to the case before us, because the Act plainly points to this, that the creditors of bankers are to be secured, and to be secured *pari passu*, if a stoppage of payment takes place, and being secured *pari passu* we put out of the way everything which is not of a certain character. It is true that the mode taken of annulling deeds, instruments, and conveyances, would not alone of itself remove such lien as this Appellant might have acquired by the deposit of the deeds. But when you find the 8th section pointing to all the property of the banker, and saying that no debts shall be recognised which are not secured in a certain manner, I conceive the true intent and meaning of the Act to be, that everything in the shape or nature of a security for debt is a thing which must be registered before it can have any effect or validity whatever. If it cannot be registered, so much the worse for the person who takes the security. But the only security that the trustees are to look to, when administering the estate of the bankrupt, is his interest in the lands, subject to this question which we are now considering, that they always had an interest in the lands subject to the payment of the debt. You are to look at his entire interest in the land as unaffected by debt, and you are not to regard debt contracted by him in any manner whatever, unless you find that that debt is secured by an instrument registered in the manner which is provided. My Lords, I think that is the sound construction of an Act of this kind, which is plainly intended for the purpose of preventing the whole property of a banker from being swallowed up by preferential securities being

given, and which is also intended to secure the distribution of his property equally among his creditors. The 8th section charges every debt of the banker, without priority of any kind, upon the property to which the banker has a title of any kind; it charges any amount of debt which has not been secured *modo et formâ* as prescribed by the Act. But it does not rest there. The Irish *Registration Act* is exactly similar to our English *Registration Act*, and there are cases in which it has been held that where a memorandum accompanies the deposit of such a character as we have here it falls within the term "conveyance," as a thing to be registered under the Registry Acts of *Ireland*, and it has been held also that where there is a memorandum which amounts in effect to an agreement in writing for a mortgage of property comprised in the instrument deposited, there you have that which is in Equity a conveyance which ought to be put upon the register. Now, in this case, the letter which I have read, clearly, after reciting that the whole of the *Dame Street* property is held as security, not only charges the *Dame Street* property, but it says, in addition to that, I agree that you shall hold this other property for the security of the overdrawn balance, and converts this into an agreement that for the overdrawn balance they shall hold both those properties, namely, the *Dame Street* property, and the county of *Down* property, and holding them for that purpose, that is an instrument which might have been put upon the register, and which would have given notice to every creditor with regard to the existing interest of the banker in the leasehold estate as regards *Dame Street*, and of his freehold interest. It is said that the stoppage took place within a month afterwards. I do not think that makes any difference whatever. The instrument is not registered yet. It is argued that it was necessary that it should be registered within the month, and that it would have been an idle ceremony to register it after the stoppage had taken place. But because the Appellant waited to take proceedings until the month of August had all but expired, because after the stoppage it would have been useless for them to register, it does not appear to me that there is any clause in the Act which exempts the holder of such a security from the duty of registration, or that there was anything to prevent him from registering after the 2nd of August. I do not think

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that the Appellant can be exempted from the registration simply because the stoppage had taken place a few days before.

Then, my Lords, there remains still one question as to the validity of the deed which was executed under the 10th section, which provides for a deed of assignment by a banker who has stopped payment, to trustees for the payment of his debts. The 8th section having subjected the whole property, the subsequent section for transfer thereof to trustees is intended to put certain persons on behalf of all creditors in the position of being able to sue in their own names, as having vested in them all the rights of the banker for the purpose of distribution amongst the creditors, by means of which those persons named will be entitled to collect the debts, and to hand over the property for the benefit of the creditors, just as the assignees in bankruptcy would do with regard to the assets of the bankrupt. Then we come to the proviso in the 10th section, that the trustees shall be approved by one half of the creditors, or (it goes on to say) by the Lord Chancellor or some other functionary. It is perfectly clear upon the face of it that this is a directory clause, giving the creditors who may be interested under the bankruptcy a right to intervene if they feel themselves aggrieved; and there are subsequent clauses, all directed to the same effect, by which any creditor aggrieved may present a petition to the Lord Chancellor to have the matter disposed of under his control and direction. But to say that the appointment of those trustees is altogether and absolutely invalid on account of these provisoes, seems to me to be an idle contention. The whole intent of the Act is not to be frustrated by a clause which, after it has subjected the property to the debts, merely directs the proper mode of getting in the property. The whole property is charged and subjected to general debts for the benefit of the creditors, and there is a specific mode of complaint to the Lord Chancellor pointed out as regards persons claiming under the instrument. But I do not think that your Lordships are under any necessity of going into that somewhat minute point which was raised about the amount of the majority of the creditors, because if your Lordships should unfortunately have so to do, it could only result in your having to send it back for inquiry, inasmuch as there is no evidence before us clearly tabulated on that point one way or the other.

But I think it is unnecessary to go into any inquiry whatever upon the subject, because I think the instrument is, even as regards the Appellant, a perfectly valid and effectual instrument for the purpose for which it was entered into, namely, for the purpose of the distribution of this property subject to any complaint which persons may think they are entitled to make to the Lord Chancellor with regard to the trustees or their conduct.

My Lords, I think I have gone through the several points which have been suggested in the course of this inquiry. There is only one question which seems to me to require any serious consideration, subject to anything which may occur to your Lordships which has not occurred to myself, with regard to the judgment of Lord Justice *Christian* with reference to the question of banks of issue. Beyond that, there seems to be nothing requiring serious consideration, except the question whether or not an equitable mortgage of this character can prevail against the 8th section of the *Bankers Act* when once your Lordships have determined that the *Bankers Act* deals with this subject-matter. I think, with regard to the existing memorandum, that that memorandum was one which might have been registered, and that, if it might have been, it ought to have been registered; and, therefore, I should advise your Lordships to affirm the decree which has been come to in the Court below.

LORD CHELMSFORD :—

My Lords, in this case the judgments of the Master of the Rolls and of the Lord Chancellor were in favour of the Respondents, the Plaintiffs in the suit, upon all the questions raised in argument upon this appeal. The Lord Justice differed from them only on the question whether the Acts of Parliament upon which the case depended were applicable to bankers generally, or were confined to bankers who issued notes. Upon all the other parts of the case the Lord Justice expressly said that he offered no opinion, and, of course, no conclusion can properly be drawn from his silence one way or the other.

The first question to be considered, which goes to the foundation of the whole case, is, whether the *Bankers Act*, 33 Geo. 2, c. 14 (*Ir.*), has been repealed in whole or in part by any Bankruptcy Act

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which has been subsequently passed. Upon this point the decisions are all one way, and they are only opposed by an opinion of Lord *St. Leonards* in *O'Flaherty v. McDowell* (1), which is, of course, entitled to the highest respect, but which was not relevant to the determination of the case. And even in the course of this opinion the learned and noble Lord said that "it would be impossible to deny, after the Act 40 Geo. 3, that the 33 Geo. 2 was, as far as regards stopping payment, undoubtedly considered to some extent an operative statute, because the 40 Geo. 3 deals with it as a statute then existing, and applying to the stoppage of payment." And Lord *Wensleydale*, in the same case, said "the statute of Geo. 2 is certainly not repealed, but is, I conceive, in force as to bankers;" and he adds: "The 47 Geo. 3, c. 34, s. 2, and 11 Geo. 4, & 1 Will. 4, c. 47, s. 13, recognise it by providing that it shall be unaffected by those Acts, and it is also recognised by the 8 & 9 Vict. c. 37, which repeals one part of it, and leaves the rest unaltered."

But it was argued that although the 33 Geo. 2 may not be wholly repealed by the 11 & 12 Geo. 3, the first Irish Bankrupt Act, or by any of the subsequent Acts, yet if there are provisions in those Bankrupt Acts inconsistent with the *Bankers Act*, they would so far virtually operate its repeal, because if there is an obvious inconsistency between the two enactments, the later Acts must prevail.

The 33 Geo. 2 was passed for the purpose of giving more effectual security to the creditors of bankers, which it effected by enacting that any deeds and conveyances of any real estate, or leasehold interest, or mortgage of a banker not registered within a month from the time of the execution, should be fraudulent and void against creditors; that any grant or disposition to the use or in trust for any son or grandson, daughter or granddaughter, though for valuable consideration, should also be fraudulent and be void against creditors; that after the time that any banker should (*inter alia*) stop payment, all his real and personal estate should be subject and liable to the payment of all his debts and incumbrances, without priority or preference, except such as should be secured by registered deeds or conveyances; and that where any

(1) 6 H. L. C. 142. *4 Jan 28. 35.*

banker who has stopped payment should by any deed vest his whole real and personal estate, or so much as shall be sufficient to pay all his debts, in trustees for the payment of his debts, such deed should be valid to all intents and purposes, and the estates should be and stand vested in the trustees freed and discharged from the debts of the banker, such debts only excepted as by the Act are entitled to a preference.

It was argued that the *Bankrupt Act* (11 & 12 Geo. 3) is inconsistent with 33 Geo. 2 in several of its provisions, such as provisions for vesting the estate in assignees, and those in favour of purchasers for valuable consideration, and of settlements for valuable consideration, and for making the future estate of the bankrupt liable for his debts, and some others. But this appears to me to be assuming that a commission of bankruptcy necessarily overrides the Act of the 33 Geo. 2, and deprives it of all its efficacy. If the Act of 33 Geo. 2 is not repealed, what is there in the 11 & 12 Geo. 3 to prove that the Legislature intended to take away from the creditors of a banker the peculiar benefit provided for them by the former statute? If a deed of trust for the benefit of creditors has been executed by the banker under the provisions of 33 Geo. 2, all his estate real and personal, or so much as is sufficient for the payment of his debts, is taken out of him, and there is nothing within the scope of the trust deed which the assignment in bankruptcy can pass to the assignees. Of course, if no trust deed has been executed by a banker who has stopped payment, and the 8th section of the 33 Geo. 2, making his estate liable for his debts, is alone operative, there would be nothing to prevent his estate being administered under a commission. And even where a trust deed has been executed, the operation of the *Bankrupt Act* is not altogether excluded. It would have its effect upon any estate of the banker which was beyond what was sufficient for the payment of his debts, and therefore would not vest in the trustees, and also upon his after-acquired property.

The Act of 40 Geo. 3 appears to me to shew clearly that the 33 Geo. 2 was intended to be left to its independent operation after the passing of the *Bankrupt Act*. By this Act provision is made for the security from arrest and imprisonment of the persons of bankers who have stopped payment and vested their estates in

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trustees; this protection being previously only temporary by the 33 Geo. 2. The 40 Geo. 3 entitles the banker to this benefit only on his obtaining a certificate from the trustees, signed by two-thirds of his creditors in number and value. Now, it was not very likely that a banker who stopped payment would not commit an act of bankruptcy, and the Legislature, by giving to the banker's creditors the power of granting to or withholding from him protection, evidently meant that where a trust deed was executed by a banker under the provisions of 33 Geo. 2, his estate should be administered by the trustees, although a commission of bankruptcy might have been issued.

But it was argued that if 33 Geo. 2 is not repealed in any of its provisions, yet the Act applies only to bankers who issue notes, and *Kennedy*, not being a banker of this description, his trust deed did not protect his estate from the operation of the *Bankrupt Act*. In support of the argument upon this point, the Appellant has the high authority of the Lord Justice, who gave a most elaborate judgment upon the subject. To prove that 33 Geo. 2 is to be understood in the restricted sense for which the Appellant contends, he refers to a former Act, the 8 Geo. 1, which the Lord Justice calls the present Act of 33 Geo. 2. The 8 Geo. 1, in its preamble and some of its enactments, appears to be confined to note-issuing bankers. But I am at a loss to understand how this Act can be used as an interpreter of the meaning of 33 Geo. 2, which repeals it "as to every person following or exercising the business of a banker, and to every creditor of every such person," with this singular addition, "that nothing contained in the said Act shall in any sort obstruct or impede" (not the construction, but) "the operation of any of the clauses herein contained." Now, as the 8 Geo. 1 relates entirely to bankers and their creditors, it is difficult to see when the Act was repealed as to them what remained to obstruct or impede the operation of any part of the repealing Act.

Upon this question it was said that although the 8 Geo. 1 was repealed by the 33 Geo. 2, yet the latter Act meant to confine its provisions to the same special class of bankers to which alone the former Act applied. Some colour for this argument is afforded by the preamble of the 33 Geo. 2, which recites that the trade and manufactures of the kingdom are in a great measure

carried on and supported by means of promissory notes and accountable receipts given by bankers; and the credit of such bankers and the currency of their notes will be promoted by giving a more effectual security to the creditors of such bankers. Reliance was placed upon these words as explanatory and restrictive of the general words in the enacting part of the Act. Undoubtedly, if there was any ambiguity in the language of the enactments, the preamble might be used as an interpreter; but plain and unambiguous words must receive their full sense, and cannot be restrained by the preamble; for where an Act is introduced to remedy a particular mischief, that object may be recited in the preamble, and then the Act may go on to provide generally against all mischiefs of a similar nature.

The preamble of the 33 Geo. 2 is of this limited character; but the Act of 8 Geo. 1 being swept away, how does it appear from the language of the enacting part of the later statute that the Legislature meant to rebuild upon the same narrow foundation?

The 2nd section of the Act, which is the first of the series of new enactments, is as general as words can make it. It speaks of *any* banker or bankers, and *all* creditors of such banker or bankers; and such is the general language used in several other sections; but the 4th and 5th sections appear to me to place the matter beyond all doubt. The preamble of the Act speaks of the trade of the country being carried on by means of promissory notes and accountable receipts given by bankers. Now, the words "accountable receipts" here must mean such accountable receipts as were negotiable, not only from their connection with the words "promissory notes," but also because trade could not be carried on by accountable receipts not negotiable. But the 4th and 5th sections shew that the Act applies to other bankers than those described in the preamble, for they relate to bankers giving any note, negotiable receipt, *or* accountable receipt, thereby clearly distinguishing between receipts that are negotiable and those which are mere matter of account with the customer. This distinction having been made, the 15th section, which speaks of any person giving any note or accountable receipt as a banker, and the 16th, which speaks of every creditor by accountable receipt or promissory note, must apply to accountable receipts of both kinds.

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These different clauses of the Act satisfy me that the Act was intended to apply generally to all persons following or exercising the trade or business of a banker, and that the general words "all bankers" and "any banker" cannot be restricted to a particular class, as contended for by the Appellant.

The next question to be considered is, whether the trust deed deprived the Appellant of the priority which he would have been entitled to by reason of the equitable mortgages created by *Kennedy* in his favour by the deposit of his title deeds. The first ground upon which the Appellant relies is, that these equitable mortgages were not capable of being registered, as the deposit of the deeds was unaccompanied by any writing. By the 8th section of 33 Geo. 2 it is enacted that, after the time that any banker shall stop payment, all his estate shall be liable to the payment of his debts and incumbrances, without regard to preference or priority, except such debts and incumbrances as shall be secured by deeds and registered as aforesaid—*i.e.*, according to the 2nd section—within one calendar month from the time of the execution thereof. Now, as priority is given only to creditors who hold a duly registered security, I am at a loss to understand how any one who has a security which, for whatever reason, has not been registered, can claim the benefit of an exception which applies to registered incumbrances only. But however this may be, the answer to the objection in the shape in which it is presented is, that the deposit of the deeds was accompanied by a writing which might have been registered and was not. The memorandum of the 29th of June, 1866, contains an express statement of the terms of the deposit. It was said that this memorandum was not given to the *Royal Bank* till the 6th of July, and that as *Kennedy* stopped payment on the 1st of August, there was not a month between the time of the delivery of the memorandum and of the stoppage. It was contended, on the other hand, that the time ran from the date of the memorandum. This point does not seem to me to be very material. Supposing the time is to be calculated from the 6th of July, why should not the security have been immediately registered? If the effect of *Kennedy's* stopping payment was to deprive the bank of their priority, they have only themselves to blame for delaying to secure the advantage given them by the

Legislature upon a condition which it was in their power to perform. I am disposed to think that the memorandum might have been registered within a month of its date, though after *Kennedy* had stopped payment; and that when the trustees came to administer the estate under the trust deed the bank might have claimed a priority as the holders of a registered incumbrance. But at all events, the security being unregistered, no right to such priority existed.

The only remaining question is, whether the trust deed is void in consequence of the trustees named in it not having been approved of by a majority of creditors. There is some doubt whether this objection is established in point of fact. But assuming it to be so, I see nothing in the 11th section of the Act which renders the deed void if such approval is not obtained. I do not think the answer given by the Solicitor-General to this objection is satisfactory. He argued that no deed at all is necessary, as the 8th section of the Act takes the banker's estate out of him. But this is inaccurate. That section only makes the banker's estate liable to his debts. It is the execution of a trust deed under the 10th section, which vests the estate in the trustees. If no such deed is executed the 8th section leaves the estate in the banker. But it appears to me that the provision in the 11th section must be regarded as directory only. By the 10th section it is provided that upon the execution of the trust deed by the banker his estate shall be and stand vested in the trustees. If the 11th section is to be construed as rendering the deed void if the creditors do not approve of the trustees, the estate of the banker would not vest in them on his execution of the deed as provided by the 10th section; but its operation must be suspended until it is ascertained that a sufficient number of the creditors have signified their approval of the trustees named in the deed. The words of the 11th section are not that the trust deed shall not be valid unless the trustees shall be approved of; but that the trustees named shall be approved of by the majority in value of the creditors; giving the creditors, therefore, a discretionary power of approval of the trustees, which if they do not exercise the Lord Chancellor may be applied to.

I think the decree appealed from must be affirmed.

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LORD WESTBURY:—

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My Lords, I have very few words to add to what has fallen from my noble and learned friends. I regret very much the opinion that was pronounced by Lord Justice *Christian*, able and ingenious as it is, because it has led to the presenting of this appeal, which is, in my opinion, wholly unfounded. It is impossible to suppose that the limited interpretation of the term "banker" as a banker who issues notes (supposing that to be the correct meaning of the word in the 8th section of Geo. 1, c. 14) could at all accompany the word into the statute of 33 Geo. 2. There is scarcely a section in the latter Act which is not inconsistent with the notion that the word was still to retain that limited interpretation. The word seems to be designedly extended to all classes of bankers, whether bankers of issue or bankers of deposit only. I think, therefore, that the idea that you could limit the latter statutes by the former is one without any kind of foundation.

It has been contended that this peculiar law with respect to bankers in *Ireland* was determined on the introduction of the general Bankruptcy Act. Any such notion is at once removed when your Lordships look at the language of the statute of the 40 Geo. 3. It is there plain that the previously existing statute is recognised as in force. And as regards the point in which it was defective, namely, that the statute of the 33 Geo. 2 did not provide for the bankrupt's discharge, that defect is supplied by the statute of the 40 Geo. 3. That the Act, therefore, was an Act capable of receiving full operation, and was intended to have its defects remedied, is, I think, beyond the possibility of contradiction.

There was, indeed, an ingenious argument, pressed, I think, by Sir *Roundell Palmer*, to this effect, that if bankruptcy under the general statute of bankruptcy followed upon a proceeding under the 33 Geo. 2, before that proceeding was completed by the banker's obtaining his certificate from the trustees, the farther operation of the limited statute of bankruptcy was annulled and superseded, and the case fell within the operation of the general bankruptcy statute. In answer to that, it is sufficient to observe that the trust deed executed under the 33 Geo. 2 is declared by that Act to be good and valid to all intents and purposes. And, therefore, the argument, that if general bankruptcy supervenes before the special

proceeding is completed, you may then avail yourself of the trust deed, as an act of bankruptcy under the general statute is wholly inconsistent and incompatible with the enactment in the 33 Geo. 2, which gives absolute legal validity to the trust deed, and which renders it impossible afterwards to annul it by an act of bankruptcy.

My Lords, there remains one point upon which it may be desirable to say a word. It was contended, in argument, that undoubtedly the trust deed, like an assignment in bankruptcy, would pass for the benefit of the creditors only that interest which the banker had at the time, and inasmuch as he had parted with a portion of that interest by the deposit of title deeds, that portion of his interest could not be included in the trust estate. The answer to that is, that the operation and effect of the trust deed are defined by the statute of 33 Geo. 2, and it is no answer to the words of that statute to say that there was an incapacity to register because there was merely the act of depositing deeds, and because the letter which accompanied the act of deposit is to be regarded only as evidence of the intent and object with which the deposit was made. But the transfer of the interest is effected by the deposit of the deeds, and not by the accompanying memorandum, unless the memorandum amounts to a promise to give a mortgage. If that be so we cannot help it, because the Act does not recognise incumbrances so created. The Act proceeds upon the principle of levelling all debts and reducing them to one standard, unless they are entitled to priority or preference by being secured by registered deeds or conveyances. It is probable that the notion of the validity of a mortgage by the deposit of title deeds had not been entertained by lawyers at that early period of the 33 Geo. 2. Whether that is so or not, if the creditor who had an equitable mortgage by the deposit of the title deeds had not been enabled to perfect the security in the manner required by the Act he is reduced to the level of an ordinary creditor, and is entitled to no preference; and the effect and operation of the trust deed must be gathered from the Act itself, and its operation is defined beyond all doubt by the 10th section. It sweeps into the hands of the trustees all the estate of the bankrupt. Now the estate of the bankrupt in this property, according to the argument of the

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Appellant, was a species of equitable reversion ; still it was his estate, subject to the security alleged by the Appellant. But whatever was his estate, it is carried to the trustees, *minus* only that portion of it which, previously to the trust deed, had been validly taken away from the bankrupt by a deed or conveyance registered within one month after the date of its execution. There can be no doubt, therefore, that the trust deed, as interpreted by this statute, had the effect of carrying with it all the property in those estates which were the subjects of the equitable deposit ; and that whether the memorandum was capable of registration or not the effect was the same, for the security is not one of the privileged class which is here defined, and any creditor not coming within that privileged class must prove his debt and take his dividend *pari passu* with the rest of the creditors.

My Lords, the point with respect to the majority in value is hardly worthy of serious attention, because the approbation of the trustees by the majority in value of the creditors is not made a precedent condition to the execution of the trust deed, but is a thing which, if given, may be given after the execution of the trust deed. The validity of the trust deed is not made to be dependent upon it at all. It has the characteristic of a merely directory provision, which has no effect in impairing or annulling the operation of the trust deed when made. Upon all these grounds I entirely concur with your Lordships that this appeal must be dismissed, and I trust that it will be dismissed with costs.

Decrees affirmed, and appeal dismissed with costs.

Lords' Journals, 11th March, 1872.

Solicitors for the Appellant: *Mayhew, Salmon, & Whiting; Simson & Wakeford.*

Solicitor for the Respondent: *M. J. Geoghegan.*

GEORGE IRELAND AND OTHERS	{	PLAINTIFFS	1871
		IN ERROR;	June 29. 30.
AND			
JOSEPH GIBBONS LIVINGSTON	{	DEFENDANT	1872
		IN ERROR.	Feb. 15; April 30.

Contract by Letter of Orders—Performance—Principal and Agent—Vendor and Purchaser.

Where a letter of orders which constitutes a contract from a merchant to his commission agent is so worded as to be capable of two interpretations, if the agent fairly and honestly assumes it to bear one of those interpretations, and acts on that assumption, the merchant cannot be released from his contract on the ground that he intended it to bear the other. As the error arose from his own indistinctness of expression, he must bear the loss.

L. wrote to *I. & Co.*, at *Mauritius*, desiring them to ship him 500 tons of sugar at 26/9 to cover freight and insurance: adding, "Fifty tons more or less of no moment, if it enables you to get a suitable vessel. I should prefer the option of sending vessel to *London*, *Liverpool*, or the *Clyde*; but if that is not compassable, you may ship to either *Liverpool* or *London*." *I. & Co.* could only procure, at the price mentioned, nearly 400 tons, which they purchased from several different persons, and shipped in one vessel to *Liverpool*. *L.* refused the cargo, and wrote to cancel the order so as to prevent any farther shipment:—

Held, that, under the circumstances, *L.* was bound to accept the cargo.

In the *Mauritius* market it is often impossible to obtain so large a quantity of sugar as 500 tons from one house, or to find one vessel to take it:

Quære, whether an order to commission merchants there to purchase such a cargo must be construed with reference to the customs of that market.

Quære, whether, in the circumstances above stated, the contract was to be regarded as a contract between principal and agent, or between vendor and vendee.

Semble, that the contract might be regarded in both aspects.

Kreuger v. Blanck (1) discussed.

(Duty of a commission agent explained by Mr. Justice *Blackburn*.)

THIS was an appeal from a judgment of the Court of Exchequer Chamber on a special case. The Plaintiffs, merchants and commission agents at *Mauritius*, brought an action against the Defendant, a merchant at *Liverpool*, to recover a sum of £2403 3s. 9d., claimed by them as due upon a contract for the purchase of sugar.

The declaration stated that the Plaintiffs were merchants and commission agents at *Mauritius*, that the Defendant employed

(1) Law Rep. 5 Ex. 179.

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them as such to purchase there a certain large quantity of cane-sugar at a limit fixed by himself, 26/9, to cover cost, freight, and insurance, and promised to accept the draft drawn on him for the price; that they purchased the sugar without exceeding the limit, but he refused to accept the sugar, and he dishonoured the draft. There were also the common indebitatus counts.

The Defendant pleaded: 1. Non assumpsit. 2. That the Plaintiffs did not purchase according to his instructions. 3. That the draft was not presented. 4. That Plaintiffs were employed to purchase 500 tons, 50 tons more or less, and that they only purchased and shipped 400 tons. 5. That they were employed to purchase 500 tons of sugar, and to ship the same in a ship to call for orders, and at the Defendant's option to be sent to *London, Liverpool, or the Clyde*; that they only purchased 400 tons, and shipped the same in a ship not calling for orders, and not giving him this option.

Port 4/5. The Plaintiffs replied: 1. A traverse of all the pleas. 2. To the 4th plea—setting out the Defendant's letter of instructions, 25th of July, 1864, and a telegram sent by him the next day—alleging that, according to the usage of the *Mauritius* market, it was necessary and proper to fulfil such orders by purchasing in smaller quantities; that they had shipped 400 tons in part performance of the order, and were watching the market to complete it when they received a counter order of the 24th of September, 1864. 3. To the 5th plea repeating these allegations, and alleging that it was impossible for them to procure a ship to call for orders and to give him the option of different ports. The Plaintiffs also demurred to the 4th and 5th pleas. Joinder.

Rejoinder, taking issue on the 2nd and 3rd replications, and demurrer. Joinder.

In Michaelmas Term, 1866, the Court of Queen's Bench gave judgment for the Plaintiffs on the demurrers (1). The issues in fact were, in February, 1868, referred to a Barrister to be stated in a Case.

The Case set forth the following facts:—On the 25th of July, 1864, the Defendant wrote to the Plaintiffs a letter in which he said: "My opinion is, that should the beet crop prove less than usual, there may be a good chance of something being made by

[(1) Law Rep. 2 Q. B. 99.

importing cane sugar at about the limit I am going to give you as a maximum, say 26/9 for Nos. 10 and 12, and you may ship me 500 tons, to cover cost, freight and insurance; 50 tons more or less of no moment, if it enables you to get a suitable vessel; you will please to provide insurance, and draw on me for the cost thereof, as customary, attaching documents, and I engage to give same due protection on presentation. I should prefer the option of sending vessel to *London*, *Liverpool*, or the *Clyde*; but if that is not compassable, you may ship to either *Liverpool* or *London*." On the following day the Defendant (at the instance, it was said, of Mr. *Maitland*, the Plaintiffs' agent at *Liverpool*) sent the following telegram to Mr. *Ireland*, the one member of the Plaintiffs' firm who resides in *England*:—"In writing to *Mauritius*, say Mr. *Livingston's* insurance is to be done with average, and, if possible, the ship to call for orders for a good port in the *United Kingdom*." This telegram was forwarded to *Mauritius*. The letter and the telegram were received by the Plaintiffs' firm there on the 24th of August, 1864. At that time the price of sugar and the rates of freight exceeded the limit put by the Defendant, and so nothing could be done.

On the 6th of September, 1864, the members of the Plaintiffs' firm at *Mauritius* wrote to the Defendant a letter in which they said:—"We take due note that in the hope of some good being done by importing sugar, you authorize us to purchase and ship on your account a cargo of about 500 tons, provided we can obtain Nos. 10 @ 12 D. S. at a cost not exceeding 26/9 per cwt. free on board, including cost, freight and insurance; and your remarks regarding the destination of the vessel have also our attention. Prior to the receipt of last mail, our market was firmly maintained at the high prices quoted in our last circular, but the advices then received have caused a considerable fall, and transactions in gray refining kinds equal to No. 13 D. S. have since been made at 5\$ 75c. per 100lbs., equal to a cost of about 28/9 f. o. b., with freight and insurance. Qualities inferior to No. 13 are still very scarce; and indeed, owing to the great number of vacuum pans now employed (*sic*) on the estates, we fear it will henceforward be difficult to make cargoes averaging under this number. . . . We shall continue to keep your order

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carefully before us, and if prices come within your limits, and we can lay in a good cargo, we shall not fail to operate for you." This promise the Plaintiffs acted on, and in September, when sugar fell in price and freights became lower, they obtained an offer of freight by the *Ilma*, at £2 10s. a ton, direct to *London*. This vessel was a Russian barque with a part of its loading (at £2 15s. per ton) on board; its time charter was nearly at an end, and the ship's agents were desirous to complete its cargo, and to dispatch it with all convenient speed. They therefore offered to take what would make up a complete cargo at £2 10s. a ton. It was impossible then, and seldom is possible in *Mauritius*, to purchase a large quantity of sugar in one lot from any one individual, but the Plaintiffs succeeded in purchasing from several brokers, in fourteen distinct lots, sugar of the specified quality. The quantity they thus obtained reached nearly to 400 tons; they could get no more, at that time, which would come within the Defendant's prescribed limits. In order to keep within those limits, they had to reduce materially the amount of commission they were accustomed to charge. They drew for £9468 11s. for the price and commission, and this sum, together with £1016 13s. 1d. for freight, did not exceed the price of the sugar sent, if calculated at 26/9 per cwt., which was the limit assigned by the Defendant.

On the 24th of September, 1864, the Defendant, at *Liverpool*, wrote to the Plaintiffs a letter describing the depressed state of the English market, and saying, "I would prefer for the present to do nothing, and am satisfied that low rates must rule for some time." He added, "I will write you farther by the French steamer on the 7th of October, but I fear your prices are not likely to fall to a point commensurate with our probable rates."

The 18th paragraph of the Case as prepared by the referee was in these terms: "When a commission agent at *Mauritius* receives instructions from *England* to purchase at *Mauritius* so large a quantity as 500 tons of sugar of a specified quality within a prescribed limit; it is generally impossible for him to purchase the whole at one time, or at one price, or from one seller, and it is generally necessary for him to purchase the same at different times, and in different lots or parcels."

The Case went on thus:—"If according to the proper construc-

tion to be put upon the instructions which the Plaintiffs received, as afore-mentioned, from the Defendant, the Plaintiffs had a discretion as to shipping the sugar on board a vessel direct for *London*, and were not absolutely bound to ship the same on board a vessel to call at a port for orders, then they acted in conformity with the usage of trade, and the practice of commission agents at *Mauritius*, in shipping the said 5788 bags of sugar for the Defendant, without waiting till they might be able to purchase more sugar of the specified quality within the Defendant's limit." "If, according to the proper construction to be put upon the aforesaid instructions, the Plaintiffs had no discretion as to shipping the sugar on board a vessel direct for *London*, but were bound to ship the same on board a vessel to call at a port for orders, then there is no usage of trade, or practice of commission agents at *Mauritius*, applicable to the question whether the Plaintiffs would have been justified in shipping for the Defendant the said 5788 bags of sugar on board of a vessel to call at a port for orders."

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The Court was to be at liberty to draw all such inferences of fact as a jury would be justified in drawing.

On the 10th of November, 1864, the bill drawn by the Plaintiffs on the Defendant was presented for acceptance and refused. On the 11th of February, 1865, the bill became due, and was refused payment. On the 17th of February, 1865, the sugar was sold in the *London* market for £7065 7s. 3d. net, after deducting the expenses of the sale. The difference constituted the sum for which the action was brought. The case was argued, and in November, 1869, the Court gave judgment for the Plaintiffs. That judgment was reversed in the Exchequer Chamber, by Lord Chief Baron *Kelly*, and Barons *Martin* and *Channell*, and Mr. Justice *Keating*, against Mr. Justice *Montague Smith* and Mr. Baron *Cleasby* (1). This appeal was then brought.

The Judges were summoned, and Mr. Baron *Martin*, Mr. Justice *Byles*, Mr. Justice *Blackburn*, Mr. Justice *Montague Smith*, Mr. Justice *Hannen*, and Mr. Baron *Cleasby*, attended.

Mr. *Giffard*, Q.C., and Mr. *Raymond*, for the Plaintiffs in Error:—
The Plaintiffs here substantially performed the order they had

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received, and performed it in the best, and, indeed, the only way in which they could assure a compliance with the Defendant's wishes. They could not control the customs of the *Mauritius* market, and compel one person to supply them with the whole quantity of sugar. Those customs were the result of the necessities of that market, where such quantities of sugar could only be obtained by purchases from several different persons. All this was perfectly well known. Nor could the Plaintiffs secure, within the limits of the sum fixed by the Defendant, any one particular ship to convey the sugar. [LORD COLONSAY:—Suppose it was impossible to find one ship fit for the purpose. LORD CHELMSFORD:—Or one that would call at a port for orders?] That shews that much was necessarily left to the discretion of the Plaintiffs, and these matters ought properly to be taken into account in adjudicating on the obligations of the two parties towards each other. By fixing the limits of price and quality, the Defendant himself put the Plaintiffs under restriction, and whatever he now complains of was the direct and immediate and necessary consequence of his own act. The Plaintiffs obtained 400 tons of sugar at the price required, and they would have completed the order in every respect but that his letter of September, 1864, prevented them. For so much of the contract as they actually did perform, they being ready and willing to perform the whole, they are entitled to be paid. They had a discretion as to the mode of executing the contract, so as best to answer the object of their employer, and having exercised that discretion for his benefit, and so as substantially to comply with his order, he is bound by their act: *Johnston v. Kershaw* (1).

The letters do not restrict them to one ship, calling for orders. The first letter, indeed, talks of a "vessel" calling for orders, and of the writer having an option as to the port of arrival. But the terms in which that option is spoken of, shew that it was left to the Plaintiffs to do the best they could in the matter, and they have done it. The words of the letter are, "I should prefer the option of sending vessel to *London*, *Liverpool*, or the *Clyde*, but" (which shews that he knew that it might be very unlikely for him to obtain that option, and so he adds), "if that is not compassable you may ship to either *Liverpool* or *London*." Here the *Clyde* was

| (1) Law Rep. 2 Ex. 82.

entirely left out, and the choice was given to the Plaintiffs to ship to one or other of the two ports, *Liverpool* or *London*. After that it is absurd for him to defend himself against a demand founded upon an honest attempt to comply with his wishes, by pretending that his orders have been disregarded, because he had not had the option of selecting one of three ports originally named, nor the power to make the ship call elsewhere for orders as to which port it was to proceed. His letters shew that he knew the difficulty, if not the impossibility, of the Plaintiffs doing all that he thought of; he knew the customs of the *Mauritius* trade, and he submitted to them. He cannot, therefore, decline to accept the cargo on the ground that under the necessities of those customs, and of his own limit as to price, the Plaintiffs purchased less than the whole amount he wanted, and shipped by a vessel which came to one of the ports he wished, though they could not succeed in giving him an option as to any other.

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Sir *J. B. Karlake*, Q.C., and Mr. *Charles P. Butt*, Q.C. (Mr. *Crompton* was with them), for the Defendants in Error:—

The order given to the Plaintiffs in the letter of the 25th of July, 1864, and in the telegram of the following day, was clear and precise, and left nothing to their discretion. The Plaintiffs' own letter of the 6th of September shewed that they so understood the order. There was to be a purchase of "a cargo" of 500 tons of sugar, it was to be one cargo, and was to be sent by one ship, and in order to secure the performance of the latter part of this order the Plaintiffs were allowed a margin of 50 tons more or less in the quantity of sugar. This naming of the quantity shewed that they were not allowed a discretion, they were bound by the amount stated, and the purchase of 400 tons alone was not a compliance with the order. The directions as to the quantity and as to the vessel were positive directions, not mere instructions, it being perfectly clear that Defendant would suffer loss if his directions were departed from. The expression "if that is not compassable" refers only to getting a ship to call for orders, but has nothing to do with the quantity of sugar to be purchased, or the sending it by one vessel, or by more than one. The margin of 50 tons more or less was given expressly to secure the shipment by one vessel, and had no

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other purpose. [LORD CHELMSFORD :—Must it be in one ship which carried no other freight?] It must: *Kreuger v. Blanck* (1).

The parties here stand in the relation of vendor and purchaser, not of agents and principal. The only word in the correspondence which points, in the smallest way, to a different conclusion, is the word “cost.” But that is really the equivalent of price, and means the sum at which the sugar could be sold to the Defendant. It was not in any way subject to any supposed customs in the market so as to affect the Defendant. Those customs might affect the Plaintiffs as between themselves and the persons from whom they purchased, but could have nothing to do with the Defendant, to whom the Plaintiffs sold the sugar they had bought. They were the vendors of the sugar, and would have had a right to stop *in transitu*, which is the right of a vendor, not of an agent: *Feise v. Wray* (2).

But even if the view of the Plaintiffs could be admitted, and they were to be treated only as the agents of an English principal, they were bound exactly to obey his order, and to send a cargo of 500 tons, or not to operate at all. [LORD CHELMSFORD :—Might they not have two characters—agents so far as the purchase was concerned; vendors so far as related to the right to stop *in transitu*?] In either character they knew, for they so expressed it, they must do as they were ordered, or ought not to operate at all.

The words of the letter of the 25th of July “a suitable vessel,” and the “vessel” (in each case the singular number is used), shew plainly that only one ship was meant, and to divide the cargo, sending by more than one vessel, was only to increase the expense to the Defendant and to subject him to inconveniences of all sorts. The very permission to ship direct either to *Liverpool* or to *London* shewed that only one vessel was contemplated. The extension in this telegram to “a good port in the *United Kingdom*” again pointed to one single vessel. That was not to be disregarded, for if they might send in two vessels they might send in twenty, or a hundred. In the correspondence the word “cargo” is employed, and *Kreuger v. Blanck* (1) shews that that word means a whole cargo, and not a parcel of one. No supposed custom in the place

(1) Law Rep. 5 Ex. 179.

(2) 3 East, 93.

of purchase of goods can vary a written contract. The dealing between the parties here was upon a written contract, which cannot be affected by a custom, unless both parties are shewn to have known the custom, and to have dealt with each other in reference to it: *Trueman v. Loder* (1). There is no evidence of that in this case. *Bellingham v. Freer* (2) is to the same effect.

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Mr. *Giffard*, in reply :—

A mercantile contract is not to be tried like a special plea, and, therefore, where a contract is, as this was, general in its terms, and some discretion is expressly, and more must inevitably, from circumstances, be left to the party who is to execute it, the customs of the place, and of the particular trade, and the necessities thereby imposed on the agent, must all be considered with reference to its construction.

LORD CHELMSFORD :—This question, which is of considerable importance to the parties, depends on the construction to be put upon two mercantile letters. The case hardly required that we should trouble the Judges for their assistance, but we have the advantage of their presence. In the Court of Queen's Bench, where there were three Judges, there was a unanimous judgment in favour of the Plaintiffs. In the Exchequer Chamber there were six Judges, two of whom were for affirming and four for reversing the judgment of the Court below; so that in the result four Judges reversed the judgment of five. The question which I propose to put to the Judges is, "Whether judgment ought to be entered for the Plaintiffs or the Defendant in Error."

MR. BARON CLEASBY :—

My Lords, I answer your Lordships' question, by saying that in my humble opinion the Plaintiffs are entitled to judgment.

I have already expressed my opinion to that effect when the judgment in this case was given in the Exchequer Chamber. Upon farther consideration I adhere to the judgment and reasons then given, and I am unwilling to occupy unnecessarily the time of your Lordships by repeating what is there expressed.

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(1) 11 Ad. & E. 589.

(2) 1 Moo. P. C. 333.

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It may be summed up in a few words. The answer to the question put depends upon the proper construction of two letters (the 25th of July, 1864, from Defendant to Plaintiffs, and 6th of September, 1864, from Plaintiffs to Defendant), with an addition to the first contained in a telegram (1). The second letter is only an acceptance of the instructions contained in the first, and the last sentence in the first letter gives a decisive key to its proper construction. It is in these words: "I should prefer the option of sending vessel to *London*, *Liverpool*, or the *Clyde*, but if that is not compassable, you may ship to either *Liverpool* or *London*."

There are two events contemplated, because there is a preference. The preference is given to having a vessel at the disposal of the Defendant as regards its destination. This involves necessarily that the whole cargo should belong to the Defendant. He could not give a destination to a vessel containing cargo of other persons.

The other alternative is shipping to one of two designated ports, *London* or *Liverpool*; and this can be as well done whether what is shipped is part of a cargo or a full cargo.

As the first alternative of engaging a vessel to call for orders could not be had, the other alternative only remains, viz., to procure and ship 500 tons (50 tons more or less) to *London* or *Liverpool*. And the question raised is, whether, though the Defendant's cargo need not occupy the whole ship, it is not essential that it should form one shipment on board one ship?

Independently of any consideration founded upon the customary and necessary mode of executing such an order at *Mauritius*, it would be a reasonable construction of the instructions to say, that if a vessel bound for one of the designated ports were ready to take 400 tons at an easy freight it would be right for the agent, and his duty, to take the opportunity afforded of acting upon the order; for the Plaintiffs at that time had, by this letter of the 6th of September, accepted the employment of the Defendant for the usual commission and reward, and were his agents, and bound to use due and reasonable care and diligence as such. It was not a mere contract between vendor and vendee (like the case of *Kreuger v. Blanck* (2), which will be shortly noticed), although

(1) See *ante*, p. 397.

(2) Law Rep. 5 Ex. 179.

after the goods were shipped a relation like that of vendor and vendee might arise. But when an order of this description is given to be executed at *Mauritius* (not an order of an unusual nature, but, as appears from the Case, a customary one) it seems to me it would be unreasonable in dealing with the conduct of the agent to exclude from consideration the usual and customary mode of executing such orders. And one statement in the Case appears to be conclusive on the point. For it is found as a fact that, supposing the instructions not to be limited to the engagement of an entire ship to call for orders, the Plaintiffs in shipping the 400 tons acted in conformity with the usage, as it was, I submit, their duty to do.

One case was referred to in the course of the argument, and much relied upon by the learned Counsel for the Defendant, *Kreuger v. Blanck* (1). The decision in that case has really no bearing upon the present, for the following reasons: First, the propriety of executing the order by more than one shipment (which is the real question in the present case) was never under consideration. Secondly, in that case the question did not arise between principal and agent. The Plaintiffs were timber merchants at *Calmar* in *Sweden*, and the Defendant had ordered of them a certain cargo of laths. It was a case between vendor and vendee; there was one indivisible contract for a certain quantity, which the vendee was entitled to have executed before he could be called upon. Thirdly, in that case the Plaintiffs had shipped a cargo much larger than the cargo ordered by the Defendant, and upon the Defendant refusing this larger cargo, the Plaintiffs, when the vessel arrived at the port of discharge, selected out of the cargo a quantity corresponding with the Defendant's order, and tendered it to him. There was no shipment made of the Defendant's order, and the Defendant thereby lost the benefit of giving a destination to the vessel; for the charter was to the *Penarth Roads*, to call for orders in the *Bristol Channel*, and the Defendant could not give these orders without accepting the whole cargo. As this case has no bearing upon the present, I express no uncalled for opinion as to the correctness of the judgment.

In my humble opinion the Plaintiffs are entitled to succeed,

(1) Law Rep. 5 Ex. 179.

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and the judgment of the Queen's Bench to that effect ought to be upheld.

MR JUSTICE BLACKBURN:—

My Lords, I will, with your Lordships' permission, deliver along with my own the answer of my Brother *Hannen*, who authorizes me to say he agrees in the reasons I am about to give to your Lordships.

In answer to your Lordships' question, I have to say that in my opinion the judgment ought to be entered for the Plaintiffs.

The question depends almost entirely on the true construction of the letter of the 25th of July, 1864, from the Defendant to the Plaintiffs. In that letter, as set out in the pleadings and Case, occurs the following passage: "The limit I am going to give you as a maximum, say 26/9 for numbers 10 to 12, and you may ship me 500 tons, to cover cost, freight, and insurance, 50 tons more or less, of no moment, &c."

Probably if we had access to the original, we should find that this is miscopied, and that what was written was: "The limit I am going to give you as a maximum, say 26/9, to cover cost, freight, and insurance, for Nos. 10 to 12, and you may ship me 500 tons, 50 tons more or less of no moment, &c." Perhaps the words "to cover cost, freight, and insurance" were interlined in the original, and the copyist has inserted the interlineation in the wrong place. At all events the letter must be construed as if the words were placed as I have suggested.

The terms at a price, "to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents," are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter-party, bill of lading, and policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight,

which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In substance, therefore the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way.

If the consignor is a person who has contracted to supply the goods at an agreed price, to cover cost, freight and insurance, the amount inserted in the invoice is the agreed price, and no commission is charged. In such a case it is obvious that if freight is high, the consignor gets the less for the goods he supplies, if freight is low he gets the more. But inasmuch as he has contracted to supply the goods at this price he is bound to do so, though, owing to the rise in prices at the port of shipment making him pay more for the goods, or of freight causing him to receive less himself, because the shipowner receives more, his bargain may turn out a bad one. On the other hand, if owing to the fall in prices in the port of shipment, or of freight, the bargain is a good one, the consignee still must pay the full agreed price. This results from the contract being one by which the one party binds himself absolutely to supply the goods in a vessel such as is stipulated for, at a fixed price, to be paid for in the customary manner, that is, part by acceptance on receipt of the customary documents, and part by paying the freight on delivery, and the other party binds himself to pay that fixed price. Each party there takes upon himself the risk of the rise or fall in price, and there is no contract of agency or trust between them, and therefore no commission is charged.

But it is also very common for the consignor to be an agent, who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order. In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the actual cost and charges at which the goods are procured by the consignor, with the addition of a commission; and the naming of a maximum limit shews that the order is of

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that nature. It would be a positive fraud if, having bought the goods at a price including all charges below the maximum limit fixed in the order, he, the commission merchant, instead of debiting his correspondent with that actual cost and commission, should debit him with the maximum limit; nor can I doubt that in an action brought against him as an agent for not accounting properly, this extra sum would be disallowed.

The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering them, the freight being in noways an element in the limit. But when, as in the present case, the limit is made to include cost, freight, and insurance, the agent must take care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed in his order; if it does, the principal is not bound to take the goods. If by due exertions he can execute the order within those limits he is bound to do so as cheaply as he can, and to give his principal the benefit of that cheapness. The agent, therefore, as is obvious, does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission because there is a contract of agency.

11 FEB 199 I should apologize for stating so precisely what your Lordships doubtless know already, if it was not that I think one of the learned Judges in the Court below has fallen into a fallacy from not recollecting what I am sure he well knew. It is quite true that the agent who in thus executing an order, ships goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house, and the owner of that house. The property in the bricks passes from the brickmaker to the builder, and when they are built into the wall, to the owner of that wall; and just so does the property in the goods pass from the country producer to

the commission merchant; and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from the one to the other; and consequently the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*.

I therefore perfectly agree with the opinion expressed by Baron *Martin* in the Court below, that the present is a contract between vendor and vendee; but I think he falls into a fallacy when he concludes therefrom that it is not a contract as between principal and agent. My opinion is, for the reasons I have indicated, that when the order was accepted by the Plaintiffs there was a contract of agency by which the Plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this super-added sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the Plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could.

If this view be correct it shews that the point raised at your Lordships' Bar as to whether the evidence received was that of a custom does not really arise. A commission merchant using reasonable exertions to get the goods as cheap as possible, ought to buy them in small parcels if the state of the market in the country is such that it is the reasonable way to get them. If the merchant would get the goods cheaper by giving a wholesale order to the manufacturer, which probably would be the case in *England*, where *Manchester* goods are ordered from a *London* or *Liverpool* commission agent, he ought to give the wholesale order.

The evidence shews the circumstances under which the Plaintiffs acted, and that the course they pursued was a reasonable one under those circumstances.

Having said thus much, I now come to what I take to be the real question, namely, what is the construction of the letter of the 25th of July, 1864?

One question is, whether the order required the Plaintiffs to

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procure a vessel which should carry the Defendant's sugar and no other goods. I am of opinion that it does not. The letter expresses a wish that, if possible, the Defendant should have the option of sending the vessel to *London*, *Liverpool*, or the *Clyde*. It is rarely possible to obtain a ship which is to call for orders unless the whole ship is chartered, and, therefore, it is probable that in order to give the Defendant this option the Plaintiffs would have required to charter the whole of a vessel. If a vessel could have been procured willing to obey the Defendant's orders, and deliver his goods as required, I do not see what harm it would do the Defendant if that ship was larger than was required, and the superfluous space was utilized in any way consistent with his contract. And therefore, if necessary, I should advise your Lordships to reconsider the decision of the Court of Exchequer in *Kreuger v. Blanck* (1). But it is not necessary to reconsider it, for the Defendant gave the Plaintiffs the alternative of shipping either to *Liverpool* or *London*; and there is no reason at all why the shipper of goods direct to a port should take up the whole of the vessel.

The second question is, whether the order for 500 tons, 50 more or less no object, and which, therefore, clearly required the Plaintiffs, if practicable, to procure him at least 450 tons, is complied with by procuring really 393 tons, and shipping them in one vessel with the intention, if practicable, to procure the remaining quantity required to make up the order and ship them by another. As the Defendant countermanded the order before the Plaintiffs could procure the other 60 tons, the case must be considered as if the Plaintiffs had actually procured and shipped the remaining 60 tons. This I have felt to be a more plausible objection than the other, but according to the view which I take of the law the Plaintiffs, having accepted the Defendant's order, were not only entitled but bound to fulfil it in any reasonable way which they could.

In *Story* on Agency (2) it is said, "The principal is not bound by the unauthorized acts of his agent, but is bound where the authority is pursued, or so far as it is distinctly pursued. But the question may often arise whether in fact the agent has

(1) Law Rep. 5 Ex. 179.

(2) S. 170.

exceeded what may be deemed the substance of his authority. Thus, if a man should authorize an agent to buy 100 bales of cotton for him, and he should buy fifty at one time of one person and fifty at another of a different person, or if he should buy fifty only, being unable to purchase more at any price, or at the price limited, the question would arise whether the authority was well executed. In general it might be answered that it was; because in such a case it would ordinarily be implied that the purchase might be made at different times of different persons, or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed."

In the case of *Johnston v. Kershaw* (1) the Court of Exchequer acted on this doctrine. In that case the order was from a *Liverpool* merchant to one at *Pernambuco* for 100 bales of cotton, and, though the order does not expressly say so, it is clear (from the usage of trade and the facts) that the 100 bales were to be shipped to *Liverpool*. The Plaintiff purchased and shipped ninety-four bales only, and yet recovered their price, my Brother *Channell* saying, "I may add that the observation of Justice *Story* seems to me replete with common sense, and I make it the basis of my judgment. I am, therefore, of opinion that this order must not be taken as an order to buy 100 specific bales of cotton at one time, but that the Plaintiff by purchasing ninety-four bales has executed it with due and reasonable diligence."

This case was not noticed in the judgments in the Exchequer Chamber (2), but it is impossible to suppose that the three Judges, Chief Baron *Kelly* and Barons *Martin* and *Channell*, who decided it, either overlooked their own decision, or intended to overrule it. I must suppose, therefore, that they distinguished it on the ground that in the order in the case at bar there was enough to shew that the Defendant required one shipment, and one only, of the whole of what he ordered, so as to prevent that which would ordinarily have been due and reasonable diligence in the fulfilment of an order from being so in this special case. I do not doubt that the Defendant might by the use of proper terms have so limited the Plaintiffs' authority, but I do not think he did so in fact.

(1) Law Rep. 2 Ex. 82.

(2) It was noticed in the argument there; see Law Rep. 5 Q. B. 528.

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On this part of the case my Brother *Montague Smith* has, in his judgment in the Court of Exchequer Chamber, accurately and clearly expressed what is my opinion. I cannot improve on what he has said, and, therefore, I refer to it without repeating it. It will be for your Lordships to decide whether the letter has the effect of so limiting the Plaintiffs' authority. For the reasons I have given I think it had not, and I am, therefore, of opinion that the judgment of the Exchequer Chamber is wrong.

MR. JUSTICE BYLES:—

My Lords, I think judgment ought to be entered for the Plaintiffs in Error.

The decision turns mainly on the construction of the letter of the 25th of July, 1868, which letter seems to me to shew that the relation existing between the parties was not that of vendor and vendee, but of agent and principal. The following expressions appear to me to indicate the relation of principal and agent; some of them more clearly, others less clearly; but all of them to be more naturally and easily reconcilable with the relation of principal and agent than of buyer and seller. Without fatiguing your Lordships with separate observations on every one of these expressions, I would call attention to the words "*circulars*," "*orders*," "*limit*," "*maximum*," the expression "*to cover cost*," "*draw upon me for cost*." Moreover the words "*fifty tons more or less are of no moment, if it enables you to get a suitable vessel*," are, as it seems to me, very strong to shew that this was an order from a principal to his agent; for otherwise the buyer would have put it into the power of the seller and exposed him to the temptation, should the price rise or fall, to vary the quantity sold to the extent of 20 or 25 per cent. to the disadvantage of the buyer.

From the Plaintiffs' answer of the 6th of September it is plain that they understood the Defendant's letter as an authority to purchase and ship.

I see nothing in the letter or telegram to make it an implied condition in the order that the whole quantity should be shipped in one ship, although that may have been and probably was contemplated by the Defendant as the more probable event.

MR. BARON MARTIN:—

My Lords, the question in this case is, whether the Defendant in Error was bound to accept a bulk of 393 tons of sugar which was brought to *London* from *Mauritius* in a vessel called the *Ilma*. It depends almost entirely, if not altogether, upon a letter from the Defendant to the Plaintiffs, dated the 25th of July, 1864. The material part of the letter gives a limit as a maximum of 26s. 9d. per cwt. for certain qualities of sugar, and continues thus: "You may ship me 500 tons, to cover cost, freight, and insurance, 50 tons more or less of no moment, if it enables you to get a *suitable vessel*. You will please provide insurance and draw upon me for cost thereof as customary, attaching documents, and I engage to give same due protection on presentation. I should prefer the option of sending *vessel* to *London*, *Liverpool*, or the *Clyde*, but if that is not compassable you may ship either to *Liverpool* or *London*." About the same date a telegram was sent to one of the Plaintiffs, by the authority of the Defendant, viz. :—"In writing to *Mauritius*, say Mr. *Livingston's* (the Defendant) insurance is to be done with average, and, if possible, *the ship* to call for orders for a good port in the *United Kingdom*."

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The question is, whether this order must be performed by one bulk of sugar in one ship and conveyed to one port, or whether it may not be performed by two or more bulks of sugar in two or more ships.

I do not think there can be any doubt as to the relation created between the Plaintiffs and the Defendant upon the former accepting the order contained in the letter. The Plaintiffs were merchants and commission agents, not planters, and upon accepting the order undertook to use due diligence to carry it out. When they bought the sugar they did so on their own account; and when they had collected a sufficient quantity to enable them to perform the order, and thought fit to appropriate it for or to the Defendant, the relation of vendor and vendee would arise: *Feise v. Wray* (1).

A priori, I should think it likely that a *Liverpool* merchant ordering 500 tons of sugar from abroad to the *United Kingdom* would desire that it should constitute the entire cargo of one ship;

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this would give him greater facility for selling the cargo afloat, or for having the ship call for orders at *Cork* or *Falmouth*, and other advantages. I also think there is nothing more unlikely than that a merchant giving an order for 500 tons of sugar should intend that it was to be forwarded to him in several bulks, viz., 100 tons in one ship to *London*, another 100 tons in another ship to *Liverpool*, a third 100 tons in a third ship to *Glasgow*, and so on, or indeed in several separate bulks to one and the same port. I cannot think that a man of sense and intelligence would intentionally subject himself to be so dealt with. A merchant or agent abroad could not perform such an order by sending the 500 tons in bulks of a ton each in 500 different ships; and if he can forward it in more than one ship it must of necessity (in case of litigation) be a question for a jury whether the shipments were in reasonable bulks—a question upon the result of which no man could form a judgment beforehand, and which would have to be decided by what is called the discretion, or, in other words, the caprice, of a jury, and much more likely by their prejudices. I do not believe that any sane man would intentionally give such an order, or subject himself to such a litigation. The question, however, must be decided by the letter and telegram.

A similar question arose in the Court of Exchequer in the case of *Kreuger v. Blanck* (1), and my Brother *Cleasby* there stated in substance, as applicable to the case, and I think correctly, “that the order is contained in the letter, that the question turns on the construction of it, and that the Court ought to abide by the natural meaning of the words used, unless exceptional circumstances were found to the contrary.”

There are no exceptional circumstances in the present case, and the question is, what is the natural, grammatical, fair, and reasonable meaning of the letter? “Vessel” in the singular number is twice used. First, “*a suitable vessel*” to carry 450 to 550 tons of sugar; secondly, the Defendant states his preference of the option of sending “*the vessel*” to *London*, *Liverpool*, or the *Clyde*. Again, the telegram states “if possible, *the ship*” is to call for orders for a good *port* in the *United Kingdom*. To me this seems to indicate, in the clearest manner, that there was to be one ship, one port, and

(1) Law Rep. 5 Ex 179.

one bulk. I have repeatedly read and considered it, and I could understand, if the Plaintiffs had bought all the sugar that could be procured at *Mauritius* within the Defendant's limits, and had shipped it in one vessel for one of the named ports, it might have been contended that the Defendant was bound to accept it as a fulfilment and completion of the order, but I cannot understand why it should be deemed the essential part of the order that 500 tons should be forwarded, but a non-essential part of the order that it should be forwarded in one vessel to one port.

I do not desire to occupy your Lordships' time by farther verbal criticism, but beg to refer you to the considered judgment of the Chief Baron and my Brothers *Channell* and *Keating*, in the Exchequer Chamber. Their reasoning is, in my opinion, conclusive in favour of the Defendant. As I have already said, I think the case depends upon the letters of the 25th of July, and I think the custom stated in the case has no bearing upon it, but I desire to call attention to the letter of the Plaintiffs to the Defendant of the 6th of September, 1864, which to my mind clearly shews that the Plaintiffs understood the Defendant's letter of the 25th of July in the sense in which I understand it. The Plaintiffs there write:— [His Lordship read the letter, see *ante*, p. 396]. Now, here it is to be observed that the Plaintiffs twice indicate their understanding of the Defendant's letter; first they speak of "a cargo of about 500 tons," which clearly indicates one bulk, the full loading of a ship; and, secondly, they speak of the destination of *the vessel* in the singular number. This, to my mind, speaks as clearly as words can speak, that they were to provide one cargo and forward that cargo to *England* in one ship; and I cannot but think that any intelligent practical man would understand it in the same sense. I therefore think that the Defendant was under no obligation to accept the 393 tons shipped in the *Ilma*, and, in my opinion, the judgment of the Court of Exchequer Chamber was right; and my answer to your Lordships' question is, that judgment ought to be entered for the Defendant in Error.

LORD CHELMSFORD:—

My Lords, the difference of opinion which has prevailed amongst the Judges in this case, shews that the order given to the Plain-

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tiffs by the Defendant in his letter of the 25th of July, 1864 (upon which the question principally turns) is of doubtful construction; and this, in my mind, is a sufficient ground in itself for bringing me to the conclusion at which I have arrived. I would preface what I have to say by stating my opinion that the question is to be regarded as one between principal and agent, though the Plaintiffs might in some respects be looked upon as vendors to the Defendant, so as to give them a right of stoppage *in transitu*. But the transaction began as a contract of agency, and in that light I am disposed to consider it.

Now it appears to me that if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense of which it is equally capable. It is a fair answer to such an attempt to disown the agents' authority to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms. This view of the case will, in my opinion, dispense with the necessity of determining which is the more correct construction of the contract, that which was adopted unanimously by the Court of Queen's Bench, and by two of the Judges of the Exchequer Chamber, or that which the four other Judges of the Exchequer Chamber considered to be the right interpretation of it. It is sufficient for the justification of the Plaintiffs, that the meaning which they affixed to the order of the Defendant is, that which is sanctioned by so many learned Judges. It would be most unjust, after the Plaintiffs have honestly acted upon what they conceived to be the wishes of the Defendant, as expressed in his order, that he should be allowed to repudiate the whole transaction and throw the loss of it upon the Plaintiffs in order (as his correspondence shews) to escape from a speculation which had become a losing one in consequence of the market prices of sugars having fallen.

The short ground upon which I think the case may be disposed of, renders it unnecessary for me to express my opinion as to the proper interpretation of the letters upon which the Courts below have proceeded. I own that if I were called upon to do so I

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should have great difficulty in arriving at any satisfactory conclusion upon the subject, though after much hesitation I should have been inclined to adopt the opinion of the majority of the Judges as to the construction of the contract. But this very difficulty confirms me in the view I have taken of the mode in which the case ought to be dealt with, for all the doubt and perplexity which hang over it have been occasioned by the Defendant failing to express clearly and precisely how he wished the Plaintiffs to act. The Plaintiffs have construed the meaning of the Defendant's language in a manner for which there was a reasonable excuse, if not a complete justification, and with an honest desire to perform their duty to him, and have obeyed his order according to their understanding of its meaning.

In determining who is to bear the loss arising out of the transaction, it would be hard and unjust to make it fall upon the Plaintiffs, the innocent agents, who have followed what they honestly considered to be the directions of their principal, and it ought, in justice, to be borne by the Defendant, who has brought it upon himself, by his want of precision and certainty in the language employed by him in communicating his order to the Plaintiffs.

I submit to your Lordships that the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD WESTBURY:—

My Lords, this is a case which depends entirely on its own peculiar circumstances. There is hardly any principle involved in it. The question turns on the construction of a certain letter. So far as it is necessary to express any opinion, I am of opinion that the conclusion arrived at by the majority of the Judges on that question of construction is right. But whether it be right, or whether it be open to question, I concur entirely in the principles of the decision which has been just enunciated. I therefore come to the conclusion that the four Judges in the Exchequer Chamber were wrong, and that judgment ought to be given for the Plaintiff in Error.

LORD COLONSAY:—

My Lords, I have only a few words to add. I do not know that we are compelled to fix absolutely the construction to be put on



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these documents. I am certainly of opinion that the construction put upon them by the Court of Queen's Bench is the true construction. I think that in the position in which the Plaintiffs were placed as agents for the Defendant, they were, in the circumstances which occurred, perfectly entitled to send the goods as they did. But I also think that the view taken by my noble and learned friend who first addressed the House is very conclusive of the case, and that it is unnecessary for us to go farther than to arrive at that conclusion. The agents who sold the goods are not to be held responsible for having adopted one of the constructions which the document was fairly capable of, as transmitted to them by their principal.

*Judgment of the Court of Exchequer Chamber reversed.*

*Lords' Journals, 30th April, 1872.*

Attorneys for the Plaintiffs in Error: *Francis & Bosanquet.*

Attorneys for the Defendant in Error: *Field, Roscoe, Field, & Francis.*

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THE MOST NOBLE THE DUKE OF BUC- } PLAINTIFF  
CLEUCH AND QUEENSBERRY . . . } IN ERROR;

AND

THE METROPOLITAN BOARD OF WORKS { DEFENDANTS  
IN ERROR.

*Acts authorized by Statute—Compensation—Arbitrator's Evidence.*

An arbitrator may be called as a witness in a legal proceeding to enforce his award.

He may be asked questions as to what passed before him, and as to what matters were presented to him for consideration.

But no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matters submitted to him.

Though compensation may not be granted to a person annoyed by the smoke and vibration occasioned by trains passing along a railway, constructed under the authority of an Act of Parliament, where no part of his land has been taken, compensation may be given for deterioration in the value of his property occasioned in a similar manner, where a part of his land has been taken for the construction of a work authorized by an Act.

7CPD 577  
730737  
8CPD 193  
7H2 243  
250  
10Ch 437  
— 684-6  
CPD 385  
391, 410  
1aff. cas 665-8, 674-4, 680-4  
54BD 183  
14CPD 330

7aff. cas 269, 297, 301  
96BD 743

In this question of compensation may be considered his particular and individual use of that in which he has no proprietary right, such as the shore of a tidal river.

*B.* was the owner of a garden on the bank of the *Thames*, he had had (like his predecessors in the occupation of the same garden) the use of a causeway which ran from his garden to low water mark in the river—and which was always repaired and kept in order by him—he was deprived of the use of this causeway and of his communication with the river by the embankment of the river, and the formation of a road between it and his garden :

*Per LORD CHELMSFORD* :—Whether the soil of the causeway, or only an easement over it, was in him, he was entitled under the 4th section of the *Thames Embankment Act* to compensation for the loss of its use.

*Per LORD CAIRNS* :—He was a riparian proprietor, having a right to the undisturbed flow of the river along the whole frontage of his property, and was entitled to damages for being deprived of this right.

*B.* was the owner of a mansion on the banks of the *Thames*, with a large garden frontage thereon—the river was embanked under the authority of an Act of Parliament—a large strip of dry land was formed where the river had formerly flowed up to the garden, and a public road was made between this strip of land and the river. *B.* claimed compensation under the Act. The claim was referred to arbitration :—

*Held*, that the loss of the use of the river frontage and the consequent loss of privacy, and the increase of dust and noise by the creation of the embankment and road, were subjects for the arbitrators to consider as occasioning deterioration in the selling value of the property, for which he was to determine the amount of compensation. Its amount was entirely in his discretion, and his award could not be impeached on the ground that he must have considered all these subjects in making up his mind as to the extent of the money deterioration of the property and the amount of the compensation therefore to be given.

IN this case the Duke of *Buccleuch* had, in December, 1867, brought an action against these Defendants to recover from them a sum of £8325, being the amount awarded to him by an umpire selected by two arbitrators who had been appointed under the *Thames Embankment Act*, 1862 (25 & 26 Vict. c. 93), and the Acts therewith incorporated.

The Plaintiff was the occupier, under a lease from the Crown, of *Montagu House*, the garden of which ran down to the *Thames*, where a wall protected it from the river, which flowed up to it at high water. There was a door made in this wall, and the door, which was locked or opened at the pleasure of the Plaintiff, afforded him the means at high water of landing persons and goods, while at low water he was enabled to obtain the same advantages by a paved causeway which ran from the door to the

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river. This causeway was always repaired by the occupier of *Montagu House*.

The Plaintiff in the first count of his declaration set forth that the Defendants were the promoters, &c., of certain works under the *Thames Embankment Act*, 1862 (within the meaning of the *Lands Clauses Act*, 1845), and as such were authorized to execute the works described in the Act, and to take a causeway, pier, or jetty at, &c., and did enter upon and take the said causeway, &c., for the purpose of the said works, and that the Plaintiff was entitled to a certain interest in the said causeway, &c., and was entitled to compensation for the same being so taken, and also for his interest in the other lands and hereditaments adjacent thereto being injuriously affected by the execution of the said works; that this question of compensation was referred to arbitration under the *Lands Clauses Act*, 1845; that two arbitrators were appointed, that they appointed an umpire, that the umpire had made his award, and had awarded the Plaintiff a sum of £8325 as compensation, &c. Breach. There was a second count, which alleged the right of the Plaintiff in a similar form, and a third on accounts stated.

There were several pleas, the first denied the taking of the causeway, and that the Plaintiff's interest in the adjacent lands and premises was injuriously affected by the works. The second traversed his interest in the causeway, and his title to compensation for taking of the same, and denied that his interest in the adjacent lands, &c., was affected by the work, and denied that he had title to compensation. The third set out the award, and the claim of the Plaintiff as "owner of the causeway, pier, or jetty," as lessee under the Crown, and his claim for the injury inflicted on him by the works of the Defendant "injuriously affecting" his easements, rights, and privileges under his lease, and the plea traversed his right to compensation in respect thereof. There were other pleas varying this defence, but the one now important to be considered was the seventh, which alleged that the said sum of £8325, awarded as aforesaid, was one entire and indivisible, and unseparated and inseparable sum, and that the said sum included damages and compensation for matters and things in respect of which neither the said arbitrators nor the said umpire had any

power or right to award or assess damages or compensation, and over and in respect of which neither the said arbitrators nor the said umpire had any jurisdiction whatever.

Issue was joined on all the pleas, and there was a demurrer to the fourth plea, which it is not now necessary to consider (1).

The cause was tried at the sittings after Hilary Term, 1868, before Lord Chief Baron *Kelly* and a special jury, when, in order to impeach the award, the Defendants called the umpire as a witness. He himself did not make any objection to give evidence. He was asked several questions as to how the sum named in his award had been made up, and he stated in substance that the Plaintiff claimed the causeway as an easement attached to his house, that it had been taken away, and so he was let in to claim for its loss and for general damage to the house, including all its "amenities;" that among these the loss of view or prospect was hardly considered, but it was the loss of the comfort of the house and its privacy, the latter being taken away by the substitution of a public road for the river, the road bringing dust and noise, and the Plaintiff having to cross a public road instead of having immediate communication, as before, between his own private garden and the boats which brought him fruit and vegetables from his country house at *Richmond* to his house in town.

By embanking the side of the river a considerable space of

(1) The pleadings and claim are fully set forth in Law Rep. 3 Ex. 306. The following is an abstract of the claim: It was dated the 14th of February, 1867, and set forth that the Defendants had taken "a certain causeway, pier, or jetty" situate in &c., and "obstructed the use and enjoyment of a landing-place thereto, to which use and enjoyment the Duke is entitled as hereinafter mentioned." The claim alleged that the Duke had sustained damage "by reason of the several premises" and "by depreciation of the messuage and dwelling-house, lands, tenements, and hereditaments, and by otherwise injuriously affecting the same" by the execution of the works authorized by the *Thames Embank-*

ment Act. There was a claim for "compensation as well by the entering upon and taking of the said causeway, pier, or jetty, as for the removal and obstruction of the use and enjoyment of the said landing-place, and for all other damage by such injurious affecting of his said messuage or dwelling-house." The claim alleged that the Duke "is or claims to be the owner of the said causeway, pier, or jetty, and also of the messuage or dwelling-house" and lands, &c., as lessee under the Crown, "and claims to be entitled as such lessee to the use and enjoyment during the term of the said landing-place, and the easements, rights, and privileges belonging thereto and connected therewith."

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ground had been reclaimed ; part of this was made a public road, but another part (that adjoining the Plaintiff's garden) was treated as land which was to be sold, and as to which he had a preferential power of purchase. The umpire assumed that the Plaintiff would exercise this power, and on that assumption capitalised the estimated rent at £2475. He was then asked how the sum of his award was made up, and he said, "Adopting, as I did, that sum as a *datum*, my award was this—loss of jetty £200, structural damage to the walls £50. I think the kitchen was said to have been penetrated by water. Capitalised rent of the garden, £2475. Then I put it that the expense of building a wall, laying out the garden, and other matters would be about £600 ; and then I thought, after all had been done, the house would be of less value to be occupied by a nobleman or gentleman than it had been before by the sum of £5000. If these sums are added together they make £8325." He was asked, "As to the last item, what was it that occasioned the loss in the value of the house?" And he answered, "I said in the market ; if that house was to be let to a nobleman or gentleman he would give less for it by a capitalised sum of £5000." He was then asked, "By reason of what?" And answered, "By reason of a good many things, if I am to go into them ; but that would only be matter that was passing in my own mind. I took into consideration the fact that the Plaintiff had, as it stood before, the road on one side in continuation of *Parliament Street* to *Whitehall* ; but, on the other side, perfect privacy. When the embankment was made the evidence shewed there would be a roadway, and that roadway would be above the present level of the garden, and therefore the only thing he could do would be to build a high wall and shut it out. There would be traffic, and dust, and dirt, and commotion, and noise, which seemed to me to alter the character of the house entirely. After I had heard all the evidence and arguments, and had been a second time to see the place, and had taken into consideration all I could, it seemed to me, although it is true some people might not have the same objection to the alteration that others had, that, upon the whole, if a person came there to take the house, he would not give for it by £5000 what he would have given for it before."

A verdict was entered for the Plaintiff for the full amount of

the award, leave being reserved to move to enter a verdict for the Defendants or a nonsuit. A rule having been obtained, cause was shewn against it, and, after full discussion, it was, by the unanimous judgment of the Lord Chief Baron, Mr. Baron *Martin*, Mr. Baron *Bramwell*, and Mr. Baron *Channell*, discharged (1). The case was then taken by appeal into the Exchequer Chamber, where Justices *Blackburn*, *Keating*, *Mellor*, and *Lush*, agreed that the judgment of the Court of Exchequer ought to be reversed; Justices *Willes*, *Smith*, and *Brett* being in favour of affirming it (2). The present proceeding in Error was then brought. The Judges were summoned, and Mr. Baron *Martin*, Mr. Justice *Byles*, Mr. Justice *Blackburn*, Mr. Justice *Montague Smith*, Mr. Justice *Hannen*, and Mr. Baron *Cleasby* attended.

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Sir *R. Palmer*, Q.C., and Mr. *Kemplay*, for the Plaintiff in Error :—

The first point to be considered relates to the examination of the umpire. It is submitted that his evidence was inadmissible. The award was good on the face of it. It could not, therefore, be impeached by evidence of what passed in the mind of the umpire when he made it. Such evidence was inadmissible. No misconduct of any sort was imputed against him, so no extrinsic evidence could be brought forward in opposition to his award: *Johnson v. Duront*, *Ellis v. Saltau* (3); *Hodgkinson v. Fernie* (4). Yet he was called with a view to shew that he had allowed matters not properly within his jurisdiction to exercise an influence over his mind. As to the question of the admissibility of his evidence, the only direct and clear opinion pronounced in the Courts below was that of Mr. Baron *Bramwell*, and that learned Judge had expressly declared the umpire's evidence to be inadmissible (5). The other Judges seemed to think that if his evidence went to shew that he had arbitrated on something which was not within his jurisdiction, or that he had omitted to arbitrate on something which was within it, his evidence would be admissible. This mode of considering the matter was erroneous. He could not be asked what were the

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(1) Law Rep. 3 Ex. 306.

(3) 4 Car. & P. 327, and 327, n.

(2) Law Rep. 5 Ex. 221.

(4) 27 L. J. (C.P.) 66. *See H. 10, 11*

(5) Law Rep. 3 Ex. 327; see *post*, p. 437.

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reasonings passing in his own mind, which inclined his opinion one way or the other. In *Ponsford v. Swaine* (1) it was held that arbitrators were bound to produce the documents laid before them by the party who called them, but not by the other party, and that though they might be asked if a particular matter was pressed on their attention, they could not be asked what was the view they had taken of it. In *Mortimer v. The South Wales Railway Company* (2), which was an action to enforce the finding of a jury, the jurors were alleged to have given compensation in respect of the interruption of the flow of a stream of water, whereas, in fact, the stream was divided into two branches, of which one alone had been interrupted, and therefore the claim for compensation was too large, as the finding had not been restricted to that particular damage which alone ought to have been made the subject of compensation. It was answered that the verdict, being valid on the face of it, could not, in an action to enforce it, be impeached upon such a ground as this. Lord *Campbell* said (3): "The Defendants endeavour to shew, by way of defence to this action, that the sheriff's jury awarded, in respect of the diversion of the water which flows through the Plaintiff's premises, damages in respect of the whole stream diminished, the Plaintiff having a right to compensation only in respect of the diminution of a portion of it; and that, in so awarding, the jury committed an excess of jurisdiction. I am of opinion that that defence is not open upon these issues; nor do I think that the Defendant could have pleaded any plea to that effect which would have been good." He held the pleas pleaded to be in themselves good, but unavailable for the purpose of impeaching the finding of the sheriff's jury, which ought to have been impeached, if at all, upon a *certiorari* to bring it up and quash it. *Re Penny* (4) was relied on to shew that the verdict of a jury might be impeached for awarding compensation for one claim among others, which was not legally the subject of compensation; but there, though the excess of the jurisdiction did not appear on the face of the proceedings, the sheriff had wrongly directed the jury, and evidence of that fact was obtainable without the aid either of the sheriff's notes or the statement of the jurors. The case of *The*

(1) 1 J. & H. 433.

(2) 1 El. & El. 375.

(3) 1 El. & El. 381.

(4) 7 El. & Bl. 660.

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Caledonian Railway v. Ogilvy (1) does not affect the present, for there the objection to the finding was apparent on the face of it. So it was in *The Glasgow Union Railway v. Hunter* (2). Here the award was valid on the face of it, and could only be impeached by evidence, in itself inadmissible, of the motives which had influenced the mind of the umpire in making it.

As to the claim for compensation in respect of the causeway. In the first place it was denied to be in any way a part of the property of the Plaintiff. It is true it was not the subject of an actual lease, but it had always been used as part of the property under the former lease, and the Crown was bound by two agreements to grant a new lease as from 1855, and as the Plaintiff had performed his part of the agreement for the new lease, it must be taken to have been actually granted. In the next place, it was said that the Plaintiff only had, and could only have, an easement over it, which he enjoyed in common with all the other subjects of the realm, for that being part of the soil of a navigable river it could not be made the subject of a grant to an individual, and that the taking away of that easement could not be matter for individual compensation. It may be admitted that the Crown could not grant to a subject special and peculiar rights in a navigable river: *Attorney-General v. Johnson* (3) and *Gann v. Whitstable* (4). He had an actual property in the use of it: *Mason v. Hill* (5); *Sampson v. Hoddinott* (6); *Miner v. Gilmour* (7); but here the special use was that of a part of the shore at low water, which use did not interfere in the least degree with any right of the public, who could not possibly use it as the Plaintiff did, though it was individually advantageous to him. This especial use of the shore had been taken away by the act of the Defendants, and the Plaintiff was entitled to compensation for its loss.

The umpire had a right to consider all the matters which occasioned injury to the Plaintiff, all which "injuriously affected" his property. In *Reg. v. The Eastern Counties Railway* (8) the return to a mandamus negatived the injury alleged, as the ground for

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(1) 2 Macq. Sc. Ap. 229.

(6) 1 C. B. (N.S.) 590.

(2) Law Rep. 2 H. L., Sc. 78.

(7) 12 Moo. P. C. 131; and see Lord

(3) 2 Wils. Ch. Ca. 87.

v. *The Commissioners of Sydney*, 12

(4) 11 H. L. C. 192.

Moo. P. C. 473.

(5) 5 B. & Ad. 1-24.

(8) 2 Q. B. 347.

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compensation, but it was held that the compensation was not limited to the cases negatived in the return, but might extend to injury done without entering upon or taking the land, namely, by lowering a road on which the land abutted. That was a special injury to the Plaintiff, though it might be that the lowering of the road was a matter beneficial to the subjects at large. In *Ricket v. The Metropolitan Railway Company* (1) the subject of complaint was distinctly a public annoyance alone, yet even there one noble lord in this House (2) was strongly inclined to hold that, for the special injury arising to an individual from that public annoyance, compensation ought to be given. Then came the case of *The Hammersmith Railway Company v. Brand* (3); but that case does not affect the present, for it was decided on the special words of the particular Act, and the claim being for injury from the effect of things which the Act had authorized to be done, and the effects of which must have been foreseen, the claim was held unsustainable. *The Glasgow Union Railway v. Hunter* (4) merely followed *Hammersmith v. Brand*; yet even there a noble Lord protested against the too narrow construction which had been adopted in previous cases with regard to consequential damage. In *Re The Stockport Railway Company* (5) a Plaintiff was held entitled to compensation for consequential damage, because the proximity of the railway rendered his building less suitable for a cotton mill on account of an increased danger of being set on fire. It is true that there land of the Plaintiff had been taken, but that was only important as a reason for not applying to that case the rule that compensation could not be given for that which unless sanctioned by the Act would have been an actionable wrong. In *Reg. v. The London Docks* (6) no land was taken, and on that account the party seeking compensation was held not to be entitled to it. But that ground of decision is one which can hardly be supported on principle, and it has already been questioned in this very case (7) by Mr. Baron *Bramwell*, and in this House by Lord *Chelmsford*, in *The Glasgow Union Railway v. Hunter* (8), where His Lordship

(1) Law Rep. 2 H. L. 175.

(2) Lord *Westbury*.

(3) Law Rep. 4 H. L. 171.

(4) Law Rep. 2 H. L., Sc. 78.

(5) 33 L. J. (Q.B.) 251.

(6) 5 Ad. & E. 163.

(7) Law Rep. 3 Ex. 328.

(8) Law Rep. 2 H. L., Sc. 82.

said, "I should be disposed to say with Baron *Bramwell*, 'It does seem strange that the taking a piece of a man's land should let him in to prove all sorts of damage for which he could not otherwise recover.'"

Mr. *Hawkins*, Q.C., and Mr. *Philbrick*, for the Respondents:—

The validity of the award is the real substantive question before the Court. The umpire had a right to determine an amount, but not to determine any question of law, nor to assume any new jurisdiction. Here the umpire has, by his own statement, assumed a jurisdiction over matters which were not properly subject to his authority. The award shewed that upon the face of it. The Plaintiff had asked for compensation for the loss of the jetty as if for the loss of a part of his property. It never was his property. Yet he treated it as such, and insisted that his property was injuriously affected by what had been done, and, as the Defendants contended, rightfully and properly done, under the Act; he asked for compensation for the loss of the use of the jetty during the progress of the work and after its completion. [LORD CAIRNS:—By reason of the severance from the lands.] There was no distinct claim made on the ground of severance. The notice of claim set up the loss of the use of the jetty and nothing else.

The award is bad, because it is made in respect of a claim which could not be sustained at law. There could be no legal claim in respect of the loss of the pier or jetty. The extent of that claim was not in dispute, but the right to make any claim in respect of such a matter was so. That right was entirely denied. The Plaintiff had no interest in the soil or bed of the river; and therefore he had no right to claim compensation for a loss of what was a mere incident to that soil. The *Stockport Case* (1) did not justify such a claim, for there the injury made the subject of compensation was an injury in respect of what was the Plaintiff's undoubted property; it was not doubtful or indirect injury, but direct and substantial, and was capable of a money measurement. The umpire here could not give himself jurisdiction over a supposed claim, a claim not sustainable in law, by making a formal finding in respect of it. In *Ellis v. Saltan* (2) the witness was

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(1) 33 L. J. (Q. B.) 251.

(2) 4 Car. & P. 327, n.

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merely told that he need not state the reasons which influenced him in making his award, if he desired not to do so: he did not object here. If the umpire has made an award which he had no legal right to make, no Court can properly be called on to enforce it.

What the umpire did was rightly got at by his evidence. His own statement was not only admissible, but it was the best evidence on the subject. There is great reason to doubt the supposed declaration of Baron *Bramwell* on the admissibility of the umpire as a witness, and the other Judges are clearly the other way. In *In re The Dare Valley Railway Company* (1) Vice-Chancellor *Giffard* said, "I can see no reason why the arbitrator should not be just as well called as a witness as anybody else, provided the points to which he is called as a witness are proper points on which to examine him. If there is mistake in point of subject-matter, that is, if a particular thing is referred to an arbitrator, and he has mistaken the subject-matter on which he ought to make his award, or if there is mistake in point of legal principle going directly to the bases on which the award is founded, these are subjects on which he ought to be examined, and also grounds for setting aside his award." The examination of the umpire was certainly confined within these limits. [LORD CHELMSFORD suggested that in *Espinasse's Reports* there were to be found cases on this subject (2).] In *Brophy v.*

(1) Law Rep. 6 Eq. 429, 435.

(2) The cases are probably these: *Habershon v. Troby* (3 Esp. 38). Case for maliciously holding to bail. There had been an action on disputed accounts—it was referred to arbitration. The award was in favour of the Plaintiff. *Erskine*, for the Plaintiff, called for the books, and proposed to examine the arbitrator. Lord *Kenyon*: "I do not think I ought to admit the evidence. It seems to me that the arbitrator ought not to be permitted to depose here as to what transpired before him, either upon the examination of the parties, or on an inspection of the Plaintiff's books."

Gregory v. Howard (3 Esp. 113). Disputed accounts; action on a promissory note. The Plaintiff called a witness who had been acting as arbitrator to

settle the accounts between the parties. Objection was taken to the witness speaking as to any communication made to him in the course of the arbitration. Lord *Kenyon*: "I have often given my opinion on this subject. Evidence of concessions made for the purpose of settling disputes I shall never admit, but facts admitted before the arbitrators I always shall. I shall, therefore, allow the arbitrator to be examined and to speak to such matters of fact as were admitted by the parties before him."

Martin v. Thornton (4 Esp. 180). Action for maliciously holding to bail. Plaintiff had been employed as a writer for the Defendant, and had sued for payment for his services. While that action was pending, Defendant had

Holmes (1) there was a suit in respect of partnership accounts—there was an inquiry before an arbitrator, and he was examined and allowed to be asked what had passed before him.

The evidence shews that £5000 were given in respect of matters not included in the reference. If that should be determined to be an illegal item that vacates the whole award. Now that item can be, as it were, earmarked, for the umpire gives a specific sum for each particular thing, and there is not any other item but that which may not be made the subject of compensation, and all the other items and the sums given in respect of them are known. [LORD CAIRNS:—Suppose that, in consequence of all these other things, the house would have a less money value than before by £5000, would not the award be right?] But independently of the right to consider some of the things as causes of depreciation, the Defendants insisted that, so far from the house being lessened in value by £5000, it was increased in value by £10,000. But without going into that question, it is clear that what was made to furnish grounds for so large a claim for compensation was, in fact, not a subject for consideration by the umpire. The case of the *Stockport Railway* (2) cannot justify this claim, while the case of *The Caledonian Railway v. Ogilvy* (3) is a distinct authority to shew that such a claim cannot be supported. No injury consequent on the creation of works authorized by the Legislature can be a ground for compensation: *Hammersmith Railway Company v. Brand* (4). The loss of prospect cannot be a ground for an action or for compensation. If one man comes on another's land and builds a high brick wall, there may be an action of trespass against him, and damages can be given for his wrongful use of the land, but not for the mere

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arrested Plaintiff, and held him to bail for two sums which had been paid as satisfaction to him. Both cases were referred to arbitration. Award that the Plaintiff had been fully paid, but that there was not any cause of action against him on account of the money which he had been so paid. The award was produced. Defendant's counsel then called the arbitrator to prove that the

reference was of all matters in difference, and that a claim had been made before him by *Martin* for compensation for the injury. This evidence was objected to. It was contended that the award must speak for itself. Lord *Alvanley* admitted the evidence.

(1) 2 Molloy, 1.

(2) 33 L. J. (Q. B.) 251. 10 Jan 1856

(3) 2 Macq. Sc. Ap. 230.

(4) Law Rep. 4 H. L. 171.

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loss of prospect which the wall occasions. Here the loss is of that kind, and the loss and obstruction take place not on the Plaintiff's land, but on land that does not, and never did, belong to him. No action, therefore, would have lain by him if the Act had not passed, and no claim for compensation can be made under such circumstances for what was done under the authority of the Act: *Re Penny* (1). In *Mortimer v. The South Wales Railway Company* (2) there was a good ground of claim for compensation for the interruption of the flow of water in one branch of a stream, but the claim had been as if for the interruption of the flow of the whole stream, and if that objection had been presented to the Court in proper form and at a proper time it would have been fatal to the claim. *Reg. v. The Eastern Counties Railway Company* (3) is not an authority for the Plaintiff, for there though certain things made the subject of the claim for compensation were denied to be so, the return did not conclusively shew that there might not be others which could lawfully be the subject of such a claim, and therefore the mandamus was issued to have the claim investigated. In both these cases the claim was allowed only through an objection to the form of meeting it. In *Chamberlain v. The West of London Railway Company* (4) there was an actual interference with the access to the Plaintiff's houses, and their value in letting was materially diminished. That was held to be a subject for compensation, but any sort of injury in diminution of money value would not have been so held. [LORD CHELMSFORD:—What is the distinction between cutting off access to a house by altering a road and cutting off access to it by embanking a river?] That is not here made the subject of a specific claim. The compensation claimed is for something connected therewith, namely, the use of a jetty which never was nor could be the Plaintiff's property.

It may even be that, in some way or other, the Plaintiff is entitled to compensation for the loss of his water way—his access to the river; but something else is claimed, and it does not follow that he is entitled to anything for the noise and dirt that may be occasioned by the construction of the road, which is substituted for the river. Here the access to the river is not cut off alto-

(1) 7 El. & Bl. 660. *3 Jur. N.S. 957*. (3) 2 Q. B. 347.

(2) 1 El. & Bl. 375. *3 Jur. N.S. 704* (4) 2 B. & S. 605. *3 Jur. N.S. 935*.

gether, the mode of access alone is altered. [LORD WESTBURY:—Is he not to be compensated for being deprived of access to the river at high water?] No such claim is made in the case. The loss for the jetty alone is claimed. [LORD CHELMSFORD:—The use of the jetty at low water, but access to the river at high water. You admit the whole in the 13th paragraph of the case (1).]

The umpire had only the right to deal with the case as it was placed before him, and as there was not any claim for the loss of access to the river at high water, he was bound not to give more than nominal damages for that, or to discard it altogether. Turning the river into a roadway did not afford ground for compensation. The access was as complete as before, nay, it was more so. The Legislature had authorized that change. He had no other right on the river than any other subject. He had not the exclusive use of the causeway, it was on the shore where barges might be anchored, and every one might pass along. If another man brought up barges in front of the Plaintiff's garden wall the Plaintiff would have no right of action on that account, certainly not on account of spoiling his prospect or destroying the amenity of his house. [LORD CAIRNS:—Suppose he had a right of common, and that was interfered with, what then?] He could not claim compensation, an individual compensation for a general injury to the common. If he had no right to claim compensation for one particular matter, and that matter is yet, by the award, made part of the sum given him as compensation, the whole award is bad.

The case of *Re Penny* (2) is very important, as establishing that what is ordered by an Act to be done cannot, of itself, furnish any ground for compensation. The Plaintiff's premises were there overlooked from the railway and the railway platform, and he was held not entitled to compensation on that account, and though actual injury to the premises occasioned by the passing of the ballast trains during the construction of the railway was allowed to form a ground of compensation, Lord *Campbell* expressly said that it would not be payable in respect of the passing of trains after its construction. This last matter was the substance

(1) "That the embankment was constructed on the site of the causeway or jetty, so that the river could not flow up to the garden-wall, and that the

Plaintiff's communication with the river was by the embankment, which was a public road."

(2) 7 El. & Bl. 660.

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of the decision in *Hammersmith v. Brand* (1), and that must be so in this case, since by the *Thames Embankment Act* the Board of Works had no control over the use of the road after it had once been constructed and dedicated to the public. The construction of the road here was not only authorized but directed by the *Thames Embankment Act*. The Board of Works was not responsible for anything at all, except for injury sustained in the course of the construction of works, and none such was complained of here.

Sir *R. Palmer* replied.

LORD CHELMSFORD:—

The first question is, how far an arbitrator is bound to give evidence explanatory of his award; the next, under what circumstances the owner of land may be entitled to compensation for the operations of these Defendants acting under their own Act and the *Lands Clauses Act*. Two questions may be proposed for the consideration of the Judges:—

First: Whether the evidence given by the umpire was admissible; and if so, to what extent, and for what purpose?

Second: Whether, upon the facts, admissions, and evidence set forth in the Case and Appendix (so far as the evidence was admissible), the Plaintiff in Error is entitled to a verdict on the issue raised on the seventh plea?

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MR. BARON CLEASBY:—

Two questions were put by your Lordships to the Judges in this case—

First: Whether the evidence given by the umpire was admissible; and if so, to what extent, and for what purpose?

Second: Whether upon the facts, admissions, and evidence set forth in the Case and Appendix (so far as the evidence was admissible) the Plaintiff in error is entitled to a verdict on the issue raised on the 7th plea?

I answer the first question by giving it as my humble opinion—

1. That the umpire was a competent witness, like any other person, to prove matters material to the issues.

(1) Law Rep. 4 H. L. 171.

2. That questions might be properly put to him for the purpose of proving the proceedings before him, so as to arrive at what was the subject-matter of adjudication when the proceedings closed, and he was about to make his award.
3. That as regards the effect of the award no questions could properly be put to the umpire for the purpose of proving how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it.

First: With regard to the competency of the umpire as a witness, I am not aware of any real objection to it. With respect to those who fill the office of Judge it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the Courts of law discountenance, and I think I may say prevent them being examined. But those objections do not apply at all to a person selected as arbitrator for the particular occasion by the parties, and he comes within the general obligation of being bound to give evidence. The practice entirely agrees with this; for it is every day's practice for the arbitrator to make an affidavit where a question arises as to what took place before him, and I have known him to be examined as a witness without objection.

Secondly: Being competent generally, it follows that he may be questioned as to what took place before him, so as to shew over what subject-matter he was exercising jurisdiction. He might, therefore, prove that a claim was made for compensation in respect of one matter, *A.*, and also in respect of another matter, *B.*, and that both were entertained without objection; or he might prove that claim *B.* was objected to and rejected, or that it was after objection received. He might, in short, give any evidence for the purpose of shewing what was the subject-matter into which he was inquiring, and upon which his judgment therefore was to be founded. This would enable us to judge whether he was acting within his jurisdiction or not, for a person exceeds his jurisdiction by prosecuting a judicial inquiry in a matter over which he has no jurisdiction, quite independent of the judgment eventually given.

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And it deserves notice, that as to this evidence the umpire would be no better witness than any other person, and would not have it in his power afterwards, by his own evidence, to sustain or destroy the award. He could be corrected by any other person present at the proceedings, including the short-hand writer, if there was one.

Thirdly: As soon as the award is made it must speak for itself. It must be applied, as in other cases, by extrinsic evidence to the subject-matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it. There appear to me to be the strongest objections against allowing the umpire to be examined for the purpose of shewing what he intended to be included in the award.

In the first place it is (and, indeed, must be) a written instrument, and the general rule is applicable, that its effect must be collected from the instrument itself. The subject-matter to which it is applicable is ascertained by proof of the subject-matter of the inquiry. I cannot think that if the umpire admitted upon the inquiry claims *A.* and *B.*, and made a general award of one sum for compensation, he could be allowed to prove that in arriving at that sum he had rejected claim *B.* from the computation, or *vice versá*, if he had rejected claim *B.* upon the inquiry could he be allowed to prove that he had included it in the computation.

The award taken by itself is something certain and fixed, and settles the rights of the parties; but if evidence be admitted of the intention and state of mind of the umpire when he made it, its certainty is destroyed, and its effect depends upon his memory, clearness of intellect, and perhaps upon his views and wishes taken up afterwards. Surely it would be a most dangerous thing, after an award has been made which becomes of itself the foundation of a right, to allow any one to retain the power of explaining it away, or even of defeating it. We can properly investigate the acts of a Judge or arbitrator in prosecuting a particular inquiry, and his judgment founded upon it; but how can we investigate his secret thoughts or intentions? He is the only master of them, and what he says must be conclusive, as there is nothing which can contradict or explain it.

The objection to such evidence would be more striking if, instead of the umpire being appealed to, two arbitrators had joined in an

award. Could each have been questioned as to the composition of the award? Although they had agreed as to the result and amount of the award, it would not at all follow that they agreed in the steps by which it was arrived at. Indeed, we know that agreement in such a result is often only arrived at by some concession and compromise, and in case of a difference in the evidence of what was intended, which is to govern and influence the award?

Or it may be farther illustrated by supposing the case, instead of going to arbitration, to go to a jury. There is an assessor who presides, and he directs the jury to reject certain heads of claim and to compensate for others. The jurymen give a general verdict. Could the twelve jurymen be called as witnesses to shew to what extent they had severally acted upon the direction given, or against it, so as to vitiate the verdict by shewing that some jurymen included in it matters they could not properly include? I submit not, and that the verdict must speak for itself and be applied to the proper subject-matter, viz., so much of the claim put forward as had been entertained.

An authority has been referred to which does not seem to agree with the opinion which I have ventured to express, the case of *Brophy v. Holmes* (1), decided by Lord Chancellor *Hart*. A question arose in that case whether a certain equitable claim under a guaranty had been disposed of by arbitrators in a reference of all matters in difference. It appeared that the claim had been brought forward by the Plaintiff, but the Defendant protested that the arbitrators had no right to consider it, and gave them a caution not to entertain it. The Lord Chancellor says, "If the arbitrators said we think the guaranty not within our jurisdiction, that would be one case." All would agree, I apprehend, that so far the view taken was correct, because there would be an *act* of the arbitrators in refusing to entertain the claim which would be decisive. But in what follows the Lord Chancellor appears to think the state of mind of the arbitrators is the subject of inquiry and not their acts; for he goes on to say, "The Plaintiff might have examined each of the arbitrators, and put this plain interrogatory to each—Did you abstain in consequence of the caution, or for any other reason, from weighing the effect of the guaranty, or did you look into it and all

(1) 2 Molloy, 1.

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the matters in difference between the parties, and conclude on the whole case?" I beg most respectfully to dissent from this, as not being a correct mode of dealing with the case. The acts of the arbitrators and not the hidden operations of their minds are the proper subject of inquiry. If the claim was made and received and evidence given upon it, this would be decisive of the jurisdiction exercised by the arbitrators, quite independent of any reservation in the minds of the arbitrators at the time. One cannot help asking what would be the effect, in such a case, of the arbitrators giving different answers to the supposed question. It certainly strikes me very strongly that the state of the arbitrator's or Judge's mind is of no importance, except so far as it is embodied in some judicial act done by him. His mind may fluctuate and change more than once until the decision is delivered, and then, whether it be upon an interlocutory or final matter, the case is so far bound.

I wish to add that what has been said has reference only to such a proceeding as the present, and not to a proceeding of a different nature, viz., when an application is made (the submission having been made a rule of Court) to refer back the award, or set it aside on the ground of some mistake or misconception of the arbitrator so as to make it wrong that the award should stand. In the exercise of such a jurisdiction the Court to which the application was made would probably reject no means of informing itself whether the arbitrator had proceeded upon such a mistake or misconception. This was the nature of the application in the case *In re Dare Valley Railway Company* (1), where Vice-Chancellor Giffard thought a written statement by the arbitrator of his reasons admissible in considering whether the arbitrator had proceeded upon an erroneous view of his duties or not. The opinion given has reference only to an action at law upon the award, in which of course the rules of evidence must be attended to.

I beg, therefore, to answer your Lordships' first question, by giving my humble opinion that the umpire was a competent witness, that he might properly be questioned as to the subject of claim put forward and inquired into before him, and that he could not properly be questioned as to the matters which he included in or excluded from his award.

(1) Law Rep. 6 Eq. 429.

I am authorized by my Brother *Bramwell* to state (by permission of your Lordships) that he was misunderstood when he gave his opinion in the Court of Exchequer, if he was supposed to hold that the umpire was not a competent witness (1); he did not hold that he was not competent for any purpose, but only that he could not be questioned as to the composition of his award. This appears from the report of what he said, especially from that in the *Law Journal*.

The effect of the above opinion applied to the present case is, that the questions on pages 17 and 18 (2) of the case were properly put, and that those which follow on pages 19 and 20, beginning with the question: "Will you tell us of what items the £8000 was composed?" were improperly put; and it seems that the answers to the questions properly put raise sufficiently the question of excess of jurisdiction by the umpire.

The Second Question put to the Judges is, whether upon the facts, admissions, and evidence (so far as the evidence was admissible) the Plaintiff in Error is entitled to a verdict on the issue raised on the seventh plea.

The seventh plea alleges that the amount awarded by the umpire included certain damages and compensation in respect of which the umpire had no jurisdiction. The substance of the plea may be regarded as being that the award was made in respect of some claim for compensation which the claimant was not lawfully entitled to under his claim, and over which the umpire had not jurisdiction. And this raises the main question which has been argued before your Lordships, viz., whether the Duke of *Buccleuch* can claim compensation for the depreciated value of *Montagu House*, resulting from the loss of privacy, and the noise and dust caused by a public road between it and the river.

Before answering the second question put to the Judges, and which turns to some extent upon the form of the claim sent in by the Duke, and the terms of the plea, I wish to be allowed to consider generally what compensation he could properly claim.

He was the owner of *Montagu House* for the unexpired term of

(1) *Buccleuch v. The Board of Works*,  
Law Rep. 3 Ex. 327; 37 L. J. (Ex.)  
177.

(2) These were the questions as to  
what were the matters in discussion  
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a lease under the Crown, with an agreement to renew for ninety-nine years, from the 5th of January, 1855. The premises adjoined the river, and the natural flow of the river brought it at high water up to his garden. He had at the north-east corner of the garden a landing-place and steps, with a causeway running down to low-water mark, which gave him the convenient use of the river at all states of the tide. The ground between the house and the river is described in the lease of 1810 as being used and occupied for an ornamental garden or pleasure ground, and as being separated from the river by iron rails only. So that by the terms of his lease, which expressly gave him in the fullest terms all rights of water and other rights belonging to the premises, the Duke was entitled, as riparian owner, to the regular flow of the water all along the extremity of his garden. This valuable water right insured to the house and garden privacy, quiet, freedom from the noise and rattle of carriages by night and by day, and freedom from the dust of a public road.

Now, the deprivation of the water right is clearly an injurious affecting of the premises to which it is annexed within the proper meaning of that term. It would be an actionable wrong at the suit of the owner of the premises unless justified by special Acts, and it is unnecessary to rely upon the 27th section of the special Act, 25 & 26 Vict. c. 93 (*The Thames Embankment Act*), which recognises the right to compensation for loss of river frontages, or to the 4th section of the Act (1). The last-named section, however, ought to be noticed, because it expressly makes such a right come within the meaning of the word "land" for the purposes of the *Lands Clauses Consolidation Act*. We must take it, therefore, that the Defendants in taking from the Duke this right are to compensate as they would be bound to do if they took his land, with this difference, perhaps, that if they really took his land they might be said to take something separate from his house and garden, but by taking this right they take something which only exists as annexed to his house and garden, and may so be said to form a part of them.

(1) Which directs, that "for the purposes of this Act the word 'lands' includes easements, interests, rights, and privileges in, over, or affecting lands."

We have only, then, to apply to such a case the 63rd section of the *Lands Clauses Consolidation Act*, which enacts, that in estimating the compensation regard shall be had "not only to the value of the land" (in this case water right) taken, but to the damage sustained by the severance of the land taken from the other lands, or by otherwise injuriously affecting such other lands by the exercise of the powers of the special Act. The claimant may say to the Defendants in the present case, You sever and take away the water right annexed to my house and garden, and which gave value for habitation by securing to them privacy and freedom from noise and dust, and in the exercise of the powers of your Act, by constructing a public road where the water right existed, you actually deprive me of my privacy and my freedom from noise and dust.

Independent of the 4th section of the special Act, making the water right land for the purpose of compensation, it cannot be doubted that the construction of an embankment where the water flowed before would be an injurious affecting of the house and garden, and entitle the Duke of *Buccleuch* to compensation. And it appears to me, that as regards the amount of compensation, he may fairly and properly say, that by the injurious act of the Defendants his house and garden are changed from river-side premises to roadside premises; and it follows, that in estimating the damage you must take into account the advantages of the one and the disadvantages of the other. It would be unreasonable in such a case to separate the making of the road in the place of the river from the consequences of it, and to say that there was jurisdiction to compensate for the one and not for the other.

I do not propose to trouble your Lordships with the authorities relating to this subject. It is not necessary to rely upon the case of the *Stockport Railway Company* (1) in furtherance of the view above taken, because that view is not founded upon any land of the claimant; for example, the causeway being taken by the Defendants. And it cannot be said that there is any analogy between the case of *The Hammersmith Railway Company v. Brand* (2), where the claim was for vibration caused by the use of the railway constructed on land to which the claimant had no title, and the present

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(1) 33 L. J. (Q.B.) 251. *18 June*

(2) Law Rep. 4 H. L. 171.

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case, where the claim is for the injurious act of depriving the Plaintiff of the flow of the river, to which he had a complete right, by erecting an embankment for a public road in the place of it.

I cannot help thinking that the claimant has caused the chief difficulty in this case by making the alleged ownership of the jetty or causeway the pivot of the whole case, as if the taking of the slip of land was the only injurious act, the only *damnum cum injuriâ*, whereas that appears to me to be only a part of the case, the main grievance being the destruction of the valuable water right. If the only wrongful act against the Defendants had been the taking of that strip of land leading, it might be, to some distant stream, and the embankment and road had been built, not upon the site of a public river adjoining the claimant's property but upon other land of the Defendants, I should hesitate in saying that because the taking this strip of land satisfied the word "injurious" in the statute, and so gave the claimant a *locus standi* for compensation, it could properly be made the foundation for the recovery of compensation for the inconvenience and annoyance or depreciated value of the house and garden caused by a public road so near, although the *Stockport Case*, already referred to, is some authority for such a conclusion.

Such being the real title of the claimant to compensation, it still remains to consider the exact question for compensation upon the issue joined on the seventh plea. The foundation of the umpire's jurisdiction is the claim made by the claimant. The umpire has nothing to do with the title of the claimant or the real extent of his rights, but he is to assess the proper amount of compensation to which he is entitled in respect of what he claims. Before the claimant can recover the amount awarded, he can be put to proof of his title to what he claims, as is done in the present case by the second and third pleas. Upon the issues joined on those pleas, which involve the title of the Duke to the soil of the jetty, no question is put by your Lordships to the Judges, and therefore I offer no opinion.

The claim is set forth in the pleadings, and it will be seen by reference to it that the Duke claims to be the owner of the jetty or causeway by virtue of the lease, and he claims compensation for

the Defendants having entered upon it and taken it, and having shut up and removed the landing-place to it; and he also claims farther large damages to his messuage and lands by the otherwise injuriously affecting the same by the execution of the works authorized by the Act, and by the exercise of the powers of the Act. Now this claim makes no distinct reference to the depriving the messuage and lands of the water privilege as a head of compensation, except so far as the landing-place is shut up, and it may seem to put forward the taking of the land of the claimant, that is the jetty, as enabling him to claim compensation for the other premises being injuriously affected. At the same time the words are "otherwise injuriously affected," and they may, I think, be fairly read as putting forward a claim for a separate *damnum cum injuriâ* to the premises by the works which deprive the claimant of his water right all along his garden, and substitute for the river a public road. It is unfortunate that the claim is so defectively worded. I do not presume to say that it is clear that the view which appears to have been taken of it is an incorrect one, viz., that it limits the claim for deprivation of property to the jetty and landing-place only, but still it does appear to me that no undue effect is given to the words "otherwise injuriously affecting" by making them include the wrongful diversion of the flow of the river by an embankment and public road as well as the damaging consequence to the house and garden by that being done.

If this construction of the claim be allowed, then for the reasons already given the umpire did not go beyond his jurisdiction in taking into account upon the claim the depreciatory effect upon the house and garden of having an embankment and public road constructed where there was a flowing river before. And I therefore answer the second question by giving my humble opinion that upon the facts, admissions, and evidence so far as it is admissible, the Plaintiff is entitled to a verdict upon the issue joined on the seventh plea.

MR. JUSTICE HANNEN:—

My Lords, in answer to the first question proposed by your Lordships, I say that I am of opinion that the evidence of the umpire was admissible, and in support of this opinion I beg leave

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to refer to the reasons given by my Brother *Blackburn* in his judgment in the Court below, to which I am unable to add anything.

In answer to the second question, I say that I am of opinion that the verdict, on the issue raised by the seventh plea, should be entered for the Plaintiff.

The point submitted to our consideration is, whether the umpire, in assessing the sum he has awarded to the Plaintiff, has included any head of damage not properly the subject of compensation.

The facts which it is necessary to mention are these: The Plaintiff is lessee under the Crown of a house and grounds abutting on the north bank of the *Thames*, to which house and grounds belonged a causeway projecting into the river, of which causeway the Plaintiff had the exclusive enjoyment. The Defendants, acting under the powers of the Act for embanking the north side of the River *Thames*, entirely deprived the Plaintiff of the causeway, and constructed the *Thames Embankment* along the whole line of his garden which previously abutted on the river.

No doubt has been entertained by any of the Judges who have had to consider this case that the Plaintiff is entitled to compensation in respect of the taking of his causeway and the consequent injury to his property by depriving it of the direct access which that afforded to the *Thames*. The difference of opinion has been whether to any, and if to any, to what, farther extent the Plaintiff can claim compensation.

This depends on the true construction and effect of the 63rd section of the *Lands Clauses Consolidation Act*, 1845, which is incorporated with the Special Act, and which enacts, that in estimating the purchase-money or compensation to be paid by the promoters "regard shall be had not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands, by the exercise of the powers of the Act."

It is not disputed that the taking of the Plaintiff's causeway brings him within the terms of this section as an owner of lands taken, and consequently that he is entitled to compensation for

any damage sustained by severing the causeway from the house and garden ; and the question is narrowed to this, Has the umpire awarded compensation for anything not properly coming within the concluding words of the section, as “ damage by reason of the Plaintiff’s lands being *otherwise injuriously affected* by the exercise of the powers of the Act ? ”

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It becomes necessary to see what claims the umpire has in fact allowed under this head of damage. They may be divided thus :

1. Damage resulting from the making the embankment against the Plaintiff’s garden, not only upon the causeway, but along the whole front of his property, and by the interposition of the embankment between the Plaintiff’s land and the present shore of the river.

2. Damage resulting from the use of the embankment when made as a roadway.

I think that the umpire rightly included both these heads of claim in the compensation awarded, but the justification for his doing so rests upon different grounds in each case.

With regard to the first, the Plaintiff, as owner of land abutting on a navigable river, was entitled to a right of access to the stream along his whole frontage, and not merely at the spot where his jetty projected. If in the course of time it should have become advantageous to the Plaintiff to use the whole of the land abutting on the *Thames* as a wharf, or for any other purpose, he would have been entitled to do so, and anything which would permanently deprive him of that right of property would be the subject of an action if it were not authorized by Act of Parliament. The causeway or jetty was only constructed for the purpose of more conveniently using the right of access to the river, which might have been exercised, if desired, at any other spot. This right of access to the river is expressly recognised by the 4th and 27th sections of the Special Act as one of the subjects of compensation. The 27th section makes special provision with reference to the compensation which the owner may be entitled to claim for the damage, if any, “ to be sustained by loss of river frontage, or otherwise by reason of such embankment and roadway, or other the exercise of any of the powers of the Act.”

It seems to me clear, therefore, that the Plaintiff was entitled

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under this section to compensation, not merely for the damage resulting from the destruction of his causeway by the embankment and roadway, but also for the loss thereby occasioned of his whole right of frontage. The extent of that damage must necessarily depend on the quantity of land interposed between the Plaintiff's former frontage and the river, and on the level and disposition of its surface. These injuries to the Plaintiff's property in the causeway and right of frontage are brought about by one and the same act, namely, the making of the embankment, and are inseparable the one from the other. I think, therefore, that the Plaintiff is entitled to be compensated for the whole loss he has sustained from the combined injuries resulting from the embankment, such as it is, being constructed along his whole frontage, and ought not to be limited to so much of the loss as can be ascribed to the mere deprivation of the causeway alone.

The second head of damage, namely, that resulting from the use of the embankment when made as a roadway, is the one on which the objection to the umpire's award has been chiefly based. Again, referring to the language of the 63rd section of the *Lands Clauses Act*, 1845, it is clear that the concluding words of the section give compensation not only for the damage sustained by reason of the severance of the lands taken from those left, but also for damage *otherwise* occasioned to the lands not taken, by the exercise of the powers of this Act.

It appears to me that these words are wide enough to embrace damages much more extended than those now the subject of consideration; but construing them as applying only to damage strictly *ejusdem generis* with severance, I cannot doubt that the damage arising to the owner of property from the junction to his lands of others converted to a purpose detrimental to him, is *ejusdem generis* with the damage arising from having his lands severed from others.

It is obvious that the mischief which would arise from having the embankment converted into a road would be much greater than it would be if it were converted into a garden. If the Act of Parliament had not been passed, the Plaintiff would have had it in his power, by refusing to part with his rights, to prevent the land now made into a road from being so converted. It seems

but just that if his power to prevent mischief being done to him is taken away by law, he should receive compensation according to the measure of the injury inflicted upon him. The language of the 63rd section is comprehensive enough to secure to the Plaintiff such compensation—Why, then, should it be construed in a more restricted sense so as to inflict on the Plaintiff a wrong without redress.

It has indeed been argued that this restricted construction ought to be put on the Act, because otherwise persons whose lands are taken will be able to obtain complete redress, whereas persons whose lands are not taken may suffer injury for which compensation is not given. I cannot see the force of this reasoning. It may well be that there is a hardship in awarding no compensation to a person who sustains loss for the public benefit unless his lands are taken; but there is a manifest difference between the position of a person whose lands are taken and that of one whose lands are not. The former was possessed of something without which the proposed public purpose could not be accomplished; he could have prevented the carrying out of the undertaking if he had not been deprived of his power by Act of Parliament, whereas the person whose lands are not taken had no such power, and could not have hindered the appropriation of lands not his own to any purpose not amounting to a nuisance. The Legislature has recognised this right of property, and the power growing out of it, as a fact, but has guarded against its abuse by compelling its possessor to avail himself of it only as means of obtaining a fair compensation for real damage.

But it is contended that the decision of your Lordships in *Hammer-smith Railway Company v. Brand* (1) is an authority that the Plaintiff is not entitled to compensation for damage resulting from the use of the embankment as a roadway, because it is said, in that case as in this, the claimant was entitled to some compensation for obstruction to light and air, which would have been the subject of action but for this Act of Parliament, and which might therefore have been made an instrument by which to compel the company to give compensation for all injury resulting from the execution of the works authorized by their Act. It is, however, to be observed that

(1) Law Rep. 4 H. L. 171.

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both the noble Lords who gave judgment in favour of the railway company in that case agreed that the sections of the *Lands Clauses Act* referred to, including the 63rd, were not applicable. Lord *Colonsay* gives the reason, namely, "that no land belonging to the Plaintiffs, or in which they were interested, was taken or touched by the railway;" and Lord *Chelmsford* expresses his regret that he is "compelled very reluctantly to come to the conclusion that the Legislature has not provided for the case of the Respondents, but has left them without remedy." I respectfully submit, therefore, that that decision is not an authority applicable to the present case, where, as land of the claimant has been taken, the 63rd section of the *Lands Clauses Act* is applicable, and where, therefore, the omission to provide a remedy for real damage, which my Lord *Chelmsford* regretted in *Brand's Case*, does not exist.

This view of the effect of the *Lands Clauses Act* has the authority of the late Mr. Justice *Crompton* in the case of the *Stockport Railway Co.* (1), and I beg leave to refer to the reasons given by that learned Judge in support of the opinion I have expressed.

MR. JUSTICE BLACKBURN:—

My Lords, in answer to your Lordships' first question, I have to state that I am of opinion that the evidence of the umpire was admissible, so far as it tended to shew that he had exceeded his jurisdiction by including in the award compensation for matters for which he was not authorized to give compensation.

I stated fully in the judgment I delivered in the Exchequer Chamber in this case (2) my reasons for coming to this opinion, and then quoted all the authorities that I am aware of bearing on the question; and, as nothing has occurred to me in addition to what I there stated, I think it better to refer your Lordships to that printed judgment than to repeat the same words.

I have only to add that I think the evidence of a juryman as to what were the grounds of the verdict of himself and his fellow-jurors has always been rejected on grounds of public policy, some of which are well indicated in the opinion which my Brother *Martin* is about to deliver to your Lordships in this case, and which I

(1) 3 L. J. (Q.B.) 251. 10 June  
*25. 814* (2) Law Rep. 5 Ex. 228.

have had the advantage of perusing. I think those grounds are not applicable to an umpire, and, consequently, I do not think that a decision by your Lordships that the umpire's evidence is admissible would render it necessary to admit the evidence of jurors.

In answer to the second question, I am of opinion that the Plaintiff (the Duke of *Buccleuch*) is not entitled to a verdict on the issue raised on the seventh plea. I come to this conclusion because I think that the evidence shews that the umpire has included in his award compensation for the inconvenience sustained by the Plaintiff, in common with all owners of house property adjoining to the *Thames Embankment*, from the general carrying out of the undertaking authorized by the Legislature; which inconvenience was not caused by the severance of the causeway from the rest of *Montagu House*; and that to give compensation for such inconvenience was beyond the jurisdiction of the umpire.

No fresh case bearing on this point has arisen since the decision below, except that in your Lordships' House, of the *City of Glasgow Union Railway Co. v. Hunter* (1). The facts in that case approached very nearly to the present case; and the reasoning of the Lord Chancellor and of Lord *Chelmsford* seems to me to be in favour of the view I take of the matter; but I do not think that the decision of your Lordships can properly be said to conclude this case.

The present case was very much considered by the Judges who formed the Court of Exchequer Chamber, and no fresh argument has occurred to me, nor did I hear anything suggested during the argument at your Lordships' Bar which had not occurred either to those Judges who took a different view from me, and whose reasons were fully stated by Mr. Justice *Montague Smith* in his judgment, or to those Judges who took the same view as myself; and I am unable to add anything to the argument delivered by me in the Court below, to the report of which I refer your Lordships without attempting to restate it in other words. I think it better to do so, because those words were adopted by the learned Judges who agreed with me, and expressed their opinion as well as my own.

But there is an expression of opinion in my Brother *Martin's*

(1) Law Rep. 2 H. L., Sc. 78.

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opinion which leads me to add this: If an action of trespass was brought, and the defence was that there was a public highway over the spot; if at the trial it turned out that those who dedicated the highway had mistaken the boundaries of their own land, and run the proposed highway over a small portion of the Plaintiff's land, there would no doubt be a verdict for the Plaintiff; and the Judge ought to direct the jury in assessing damages to take into account not only the interference with the Plaintiff's property, but all damages directly arising therefrom. But I think it would be a misdirection if he were to add that they should in addition give damages for the "traffic, and dust, and dirt, and commotion and noise" on the part of the intended highroad which was on the Defendants' own land, and which, therefore, the Defendants might lawfully dedicate to the public, and so lawfully bring all these things there, even though the jury were of opinion that the roads would not have been brought so near the Plaintiff's land had the trespass not been committed. The supposed Plaintiff could no doubt force them to divert the highway and go round his land; but I think the damages I have supposed would be too remote. I mention this because I think the umpire has in fact given compensation for such damages. The supposed case is perhaps only *idem per idem*, but it may illustrate the argument; and I mention it because I perceive that my Brother *Martin* in his opinion seems to think that such damages might properly be given.

I know of no authority directly bearing on the point, but the general principle that the damages resulting from any act are confined to the immediate and natural consequences of the act is, I believe, universally agreed on, though it is not easy always to apply it. In such a case as is supposed it seems to me the supposed damages would be too remote, and therefore were not in this case submitted to the umpire; and I think that where an umpire has one thing submitted to him, and gives an award on that and also on something not submitted to him, that award, so far as regards the latter, is not binding.

MR. JUSTICE BYLES:—

I entirely agree with the judgment about to be delivered by my Brother *Martin*.

MR. BARON MARTIN:—

My Lords, in answer to your Lordships' first question, I am of opinion that the evidence given by the umpire was admissible, and I see no limit as to its purpose and extent beyond the ordinary one, that evidence is to be confined to the matter in issue. The object of calling him was to prove the seventh plea, viz., that the sum awarded by him included damages and compensation for matters in respect of which he had no power or right to award or assess compensation. Now if this matter is to be the subject of judicial inquiry, there is no person who possesses the same means of proving the truth as the umpire. He must know in respect of what he awarded, and to exclude him would seem like excluding the truth. At the same time I cannot but feel that if he be an admissible witness, there will be very great difficulty in excluding a juryman who has assessed compensation in a case under the *Lands Clauses Act*.

The award is said to be bad, because the umpire has only a limited authority by virtue of the 63rd section, which it is alleged he has exceeded. By the 49th section jurymen have precisely the same limited authority. They must deliver their verdict in two separate sums, but the same limited authority is conferred upon both. Now if the arbitrator or umpire is competent to give evidence that he exceeded his authority, and so to annul and defeat his award, what reason is there why a juryman is not competent to give evidence to prove that the jurors included in their verdict compensation in respect of a matter which is without the 49th section? I find a difficulty in answering the question. There can be no doubt as to the inconvenience and uncertainty which will arise if jurymen are permitted to give evidence to defeat their verdicts. If one juryman is admissible all are admissible, and their evidence may be conflicting, and great inconvenience arise. In ordinary cases in the Courts of Law and Equity jurymen are not permitted to make affidavits, or give evidence to affect or defeat their verdicts, and although I feel myself bound to answer your Lordships' question as I have done, I am conscious that your Lordships, as the Court of ultimate resort, may, by reason of the great inconvenience, feel yourselves called upon to arrive at a different conclusion.

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I can find no authority against the umpire's admissibility. Two cases have been cited in its favour, and although I feel that great inconvenience may arise from permitting an award to be so impeached, I nevertheless feel constrained to answer your Lordships' first question as I have done.

In answer to your Lordships' second question, I am of opinion that the Plaintiff in Error is entitled to the verdict on the issue raised on the seventh plea.

The action is upon an award, and the substantial question is, whether an award of an umpire, dated the 5th of August, 1867, is good. It is admitted to be good upon its face, but it is alleged that there were certain facts proved by the umpire himself in his evidence at the trial before the Chief Baron which shew the award to be bad. The seventh plea alleges that the sum awarded was an entire sum, and that it includes compensation for matters in respect of which the umpire had no power to assess compensation, and in respect of which he had no jurisdiction, and if this plea be true the award is bad.

In the year 1862 an Act of Parliament was passed for em-banking part of the north side of the *Thames* (25 & 26 Vict. c. 93), and by the first section the 8 & 9 Vict. c. 18 (the *Lands Clauses Consolidation Act*, 1845), except sects. 32 and 92, was incorporated with it; the excepted sections are not material to the present question. By the 4th section the word "lands" in the *Lands Clauses Act* is declared to include "easements, interests, rights, and privileges in, over, or affecting lands." By the 15th section, save as otherwise provided, it was lawful for the Defendants to purchase and extinguish any easement which any person might have over the bed of the River *Thames* within the limits of deviation, and by the 27th section rights of frontage to the *Thames* are dealt with as a valuable property.

When the Act was passed the Duke of *Buccleuch* was in possession, under two agreements with the Crown, of a leasehold interest for a long term of years of *Montagu House*, the ancient *London* residence of his family. The property is shewn on the plan; the front is to the west, and opens to *Whitehall*; the back is to the east, and was and is a garden which had a river frontage to the *Thames* of 145 feet. The tide flowed up to the garden wall, and

at the north-east corner of the garden there was a flight of steps which led down to a private gate of the Duke's, which afforded access to the river by a causeway or jetty which ran from the bottom of the steps to low water-mark in the river. It was about four or five feet in breadth, and was covered by the river at high water. It was made of stone and timber, and was used for landing coals, ice, vegetables, and other matters brought by boats and barges for the Duke's use at *Montagu House*.

The embankment was intended to be made, and has since been made, upon the foreshore in front of the garden, and is made upon and over the causeway or jetty, and the consequence and intended consequence is, that instead of the river flowing at high water up to the garden wall, as it previously did, the embankment intervenes between the garden and the river, and was constructed, amongst other purposes, for making a public roadway upon it; the whole river frontage, together with the causeway and jetty, is therefore destroyed, and a road frontage substituted.

Upon the 14th of February, 1867, the Duke made his claim, which seems to me quite wide enough to include all rights of compensation to which he was entitled. By the 63rd section of the *Lands Clauses Consolidation Act* he was entitled to compensation, not only to the value of the land to be taken, which here (by virtue of the 4th section of the *Embankment Act*) includes "ease-ments, interests, rights, and privileges in, over, or affecting lands," but "also to the damage to be sustained by reason of the severing of the lands taken from other lands of the owner, or otherwise injuriously affecting such other lands by the exercise of the powers" conferred by the Act or Acts. It was said, and said truly, that by the construction put upon the *Lands Clauses Act*, compensation can only be claimed when the act done is such that except for the Act of Parliament an action at law would have lain for doing it.

Now, applying this to the present case, the Duke had the land constituting the residence, *Montagu House*, with the courtyard, offices, and garden attached, and had annexed and appurtenant to it the jetty or landing-place, and although he had not the soil of the bed of the river he had the easement, or right, or privilege, by whatever name it may be called, of the flow of the water of the

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River *Thames* in its natural channel up to his garden wall. He had one entire thing. He had not the land alone, or the jetty alone, or the right to the flow of the water of the river alone—he had all combined together; and if any one had done an act injurious to the land or the jetty, or to the right to the flow of the water, he would have had a legal right of action against him. If the owner of the soil of the bed of the river, or any one else, had constructed an embankment and roadway upon the jetty or landing-place, so as to shut out the Duke's premises from the river, he could have maintained an action against him for two causes; first, for destroying his jetty; secondly, for depriving him of his riparian right: *Miner v. Gilmour* (1); *Lord v. The Commissioners of the City of Sydney* (2). Now, supposing such an action tried, what would be the proper direction to the jury as to damages?

In my opinion there is not a single matter mentioned in the umpire's evidence as operating upon his mind, and in respect of which he gave compensation, which would not have been a proper element to be submitted to the jury with a view to the legal assessment of damages. The only item complained of is the £5000, which he says in his opinion was the market value of the loss, if a purchaser had desired to buy the residence or to take it on lease. I think that the Judge might properly tell the jurymen that *Montagu House* with its belongings, corporeal and incorporeal, was one entire thing, and that in assessing the damages they might take into consideration the actual depreciation of its value as an entire thing in the market; that in doing so they might consider that when the river was the boundary of the garden there was perfect privacy, no noise, or traffic, or dirt, or dust, and that they might contrast that state of things with the noise, and traffic, and dirt, and dust which would be consequent upon the river boundary being converted into a boundary of roadway for the traffic of horses, carts, and carriages. Suppose at any of the residences higher up the *Thames*, or on the *Wye*, or *Dart*, or other beautiful river, where the owner was not the owner of the soil of the bed of the river, but was entitled to the flow of the water, and the owner of the soil of the bed made an embankment and shut out the river, could it be successfully contended that this being an unlawful act

(1) 12 Moo. P. C. 131-156.

(2) Id. 473.

the injured person would not be entitled to recover damages (if it were persevered in by the wrongdoer) to the amount of the market value of the injury done to his property?

By the 4th section of the *Embankment Act* the rights of the Duke to the jetty and to the flow of the river are included in the word "lands" in the *Lands Clauses Act*, and in my opinion the construction of the embankment and roadway, in exercise of the powers of the *Embankment Act*, was a severance from and an injury affecting the other land of the Duke, within the true meaning of the two Acts.

An argument was adduced on behalf of the Defendant in Error, in which I cannot concur. It was said that upon the construction given by the Courts of Law and Equity to the *Lands Clauses Act*, the immediate neighbour of the Duke might possibly have been damaged to the same extent, and yet be unable to obtain compensation. Supposing this to be so, what argument is to be derived from it? General Acts of Parliament must of necessity be framed in general language, and because a man who has sustained damage is not within the terms of the Acts of Parliament, and therefore must submit to the loss, is that any reason why a man who is within the terms of the Act is not to recover compensation for the loss and damage he actually sustains?

These were the reasons which led me to the conclusion I arrived at when the case was before the Court of Exchequer. I have read the judgments of the Judges in the Court of Exchequer Chamber, and heard the arguments before your Lordships, and I retain the opinion I originally formed; I cannot, however, but think that too little stress has been laid upon the right of the Duke as a riparian proprietor. There were many wharves between *Westminster* and *Blackfriars* bridges for loading and unloading coal and other merchandize. The embankment does not touch very many of them; it runs quite outside the land whereon they stood, and the only legal right the owners had which was directly interfered with by the embankment was the right to the flow of the water of the river up to them. The bed of the River *Thames* belongs to the Crown. This was a few years ago contested by the Corporation of *London*, but I believe they have abandoned their claim, and that the Crown is now the undisputed owner. The embankment does not touch

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most of the wharves, and, so far as I can see, except the injury to their water rights gives them a *locus standi* for compensation, they would be entitled to none.

In my opinion the Duke's right to compensation under the two Acts is not less extensive than it would have been to damage (excluding vindictive damage) in an action of tort in the event of the Defendants in Error having made the embankment without the authority of Parliament.

As to the amount awarded, it was matter entirely and exclusively for the umpire.

For these reasons I am of opinion that the Plaintiff in Error is entitled to the verdict on the issue raised on the seventh plea.

I am authorized to state that Sir *Montague Smith*, who heard the arguments, concurs in this judgment.

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LORD CHELMSFORD:—

My Lords, in this case the four Judges of the Court of Exchequer were unanimous in favour of the Plaintiff in Error; but in the Court of Exchequer Chamber their judgment was reversed by a majority of four Judges to three; the opinions of seven Judges having been thus overruled by a minority of four. Of the six Judges whose assistance your Lordships had upon the hearing of the appeal, all of them, with the exception of Mr. Justice *Blackburn*, concurred in the judgment of the Court of Exchequer.

The case upon the appeal may conveniently be considered under the heads of the two questions put by your Lordships to the learned Judges: First, whether the evidence given by the umpire was admissible, and if so, to what extent and to what purpose? Secondly, whether, upon the facts, admissions, and evidence (so far as such evidence was admissible) the Plaintiff in Error is entitled to a verdict on the issue raised on the 7th plea.

The Duke of *Buccleuch* is tenant to the Crown of *Montagu House* in *Whitehall Place*. At the time the Metropolitan Board of Works was proceeding to construct the embankment on the north side of the River *Thames* the Duke held the premises under a lease, dated the 19th of April, 1810, for a term of sixty-two years from the 5th of January, 1806, by the description of "all the piece of ground, &c., abutting eastward on the River *Thames*, on which

Montagu House stood, together (*inter alia*) with all easements, waters, watercourses, profits, commodities, advantages, and appurtenances whatsoever to the said piece of ground belonging or appertaining, or therewith or with any part thereof held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof." This lease would have expired in January, 1868; but before its expiration the Duke, by agreements with the Crown, upon spending £20,000 upon the premises in rebuilding the house and in other improvements, was to be entitled to a renewal for a term of ninety-nine years. He had performed his part under these agreements, and therefore at the time of the execution of the works by the Metropolitan Board of Works his interest in *Montagu House* and premises was that of a lessee for the residue of a term of ninety-nine years.

Montagu House and premises were bounded on the river side by a wall, along the whole length of which, at high water, the river flowed. There was a gate in this wall, usually kept locked, which led from some stairs in the garden of the house to a causeway or pier which ran out into the river to low water-mark. The causeway had been used for more than forty years for landing coals from barges, and for bringing vegetables, &c., for the use of the tenants of *Montagu House*, who always repaired the causeway at their own expense when it needed repair.

By the *Thames Embankment Act*, 25 & 26 Vict. c. 93, the Metropolitan Board of Works was authorized to construct an embankment on the north side of the *Thames* from *Westminster Bridge* to *Blackfriars Bridge*. In the course of performing the necessary works it became necessary to remove the causeway and the landing-place connected therewith, and also entirely to shut off *Montagu House* and premises from direct access to the river. In the place where the water had previously flowed a solid embankment was made, which has since become a public highway.

The Plaintiff gave the Defendants notice that he claimed compensation as well for the entering upon and taking by them of the causeway, pier, or jetty, as for the removal and obstruction of the use and enjoyment of the landing-place, and for all other damage sustained or to be sustained by him by such injurious affecting of his said messuage or dwelling-house, and other lands, premises,

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and hereditaments. And he farther gave notice under the provisions of the *Lands Clauses Consolidation Acts* (which are incorporated with the *Thames Embankment Act*) that he desired to have the amount of such compensation settled by arbitration.

Arbitrators were named by the respective parties, who nominated Mr. *Charles Pollock*, Queen's Counsel, as umpire. Mr. *Pollock*, having taken upon himself the reference, ultimately made an award in the following terms:—"I award, order, and determine that there is due from the said Metropolitan Board of Works to the said Duke of *Buccleuch* and *Queensberry* the sum of £8325 as and for compensation for the interest of the said Duke of *Buccleuch* and *Queensberry* in the said causeway, pier, and jetty; and for the shutting up of the said landing-place, and for the damage by the depreciation of the said mansion-house, lands, tenements, and hereditaments, by the otherwise injuriously affecting the same by the execution by the said Board of their said works, and by the exercise of the powers of the said Act."

The Defendants having refused to pay the compensation, an action was brought against them to recover the sum of £8325, the sum awarded. To the declaration upon the award the Defendants pleaded several pleas, only one of which in this stage of the case is necessary to be considered. By the 7th plea the Defendants pleaded that the sum of £8325 awarded was and is one entire and indivisible and unseparated and inseparable sum, and that the said sum includes damages and compensation for matters and things in respect of which neither the arbitrators nor the umpire had any power or right to award or assess damages or compensation, and over and in respect of which neither the arbitrators nor the umpire had any jurisdiction whatever.

At the trial before the Lord Chief Baron *Kelly* the Defendants in support of this plea, called Mr. *Pollock*, the umpire, as a witness. I do not quite understand whether an objection was made *in limine* to his admissibility as a witness, or merely to certain parts of his evidence, but I rather collect that the latter must have been the case, because at the close of his examination there follows the statement: "The evidence of the umpire was objected to by the Plaintiff, and admitted by the Judge, subject to such objection, and on the terms that such parts as the Court should think inad-

missible should be deemed to be struck out." But if the umpire was not a competent witness, the whole of his evidence ought to have been struck out.

That the umpire was admissible as a witness was, without a single exception, the opinion of all the Judges who have considered the question in this case; Mr. Baron *Cleasby* having been authorized to state (by permission of your Lordships) that Mr. Baron *Bramwell* was misunderstood when he gave his opinion in the Court of Exchequer, if he was supposed to hold that the umpire was not a competent witness, for he did not hold that Mr. *Pollock* was not competent for any purpose, but only that he could not be questioned as to the composition of the award.

The umpire being a competent witness, the only question is, to what extent the Defendants were entitled to examine him as to the particulars of his award. They had an undoubted right to know from him whether in his estimate of the compensation he took into consideration any matters not included in the reference, and therefore not within his jurisdiction. To prevent the Defendants from questioning him so far would have been to deprive them of information to which they were entitled, by shutting them off from the only source of it, in the breast of the umpire. He alone could tell what subjects he included under the general terms of his award. But this having been ascertained, the Defendants were not at liberty to go farther, and to ask the umpire what were the elements which entered into his consideration in determining the *quantum* of compensation. Within the limits of the reference the amount to be awarded was entirely in the discretion and judgment of the umpire. His opinion as to the extent of the damage done to *Montagu House* by the execution of the works of the Defendants was necessarily of a speculative character, and founded upon a general view of the annoyance and inconvenience which would result from the new state of things after the embankment was made and publicly used. To ask the umpire, as the counsel for the Defendants did, what led him to the conclusion as to the proper sum to be awarded, was really to inquire what passed through his mind before he formed his judgment. It would be, in my opinion, contrary to all principle so to scrutinise the exercise by an arbitrator of a discretionary power to award compensation;

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and I think that all the questions put with this object were objectionable, and the evidence given upon them ought to be struck out.

Before proceeding to the next question, I must observe that even if the evidence of the umpire had been admissible as to his reasons for thinking that *Montagu House* would be depreciated by the construction and use of the embankment because "there would be traffic, and dust, and dirt, and commotion, and noise which seemed to alter the character of the house entirely," I do not think it would prove that his award was invalid. In *Hammersmith Railway Company v. Brand* (1) it was held that a person whose land had not been taken for the purposes of a railway was not entitled to compensation from the railway company for damage arising from vibration occasioned (without negligence) by the passing of trains after the railway had been brought into use. And in *City of Glasgow Union Railway Company v. Hunter* (2) it was held that compensation could not be claimed, by reason of the noise or smoke of trains, by a person no part of whose property had been injured by anything done on the land over which the railway ran. In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use and not by the construction of the railway. But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains. In this case (as I shall presently shew) land of the Plaintiff was taken, which would have given a foundation for a claim to compensation for other lands injuriously affected. But in addition to this, in the two cases cited, there were distinct claims made, in the one on account of vibration, and in the other on account of smoke and noise occasioned by the passing trains; whereas here the umpire did not say, I gave so much for dust and noise, &c., but it occurred to my mind that these would be the consequences of the public use of the embankment, and would altogether alter the character of the house.

(1) Law Rep. 4 H. L. 171.

(2) Law Rep. 2 H. L., Sc. 78.

I now proceed to consider whether the umpire has included in his award any head of damage not properly the subject of compensation.

It appears to me that the notice of claim is rather imperfectly framed, as it does not point distinctly to the injury to *Montagu House* arising from the construction and use of the embankment. It requires the Metropolitan Board of Works to pay the Duke of Buccleuch compensation, as well for the entering upon and taking of the causeway, pier, or jetty, as for the removal and obstruction of the use and enjoyment of the said landing-place, and for all other damage sustained and to be sustained by him by *such* injurious affecting of his said messuage and dwelling-house, the word “such” referring to the taking of the causeway and removing of the landing-place. However, it has never been questioned that the umpire had authority to take into his consideration the injury to *Montagu House* arising from the construction and use of the embankment. There can be no doubt, and none has been entertained, that the Plaintiff is entitled to compensation in respect of the taking away the causeway and landing-place, and the injury arising to his house and premises by depriving him of access to the river. The only question upon which there has been a difference of opinion among the Judges is, whether the umpire was authorized to give compensation in respect of the depreciation of *Montagu House* by the conversion of the land between it and the river into a highway, and the consequent public use of it. This question partly depends upon the 63rd section of the *Lands Clauses Consolidation Act*, 1845, which is incorporated with the *Thames Embankment Act*, and which enacts that in estimating the purchase-money or compensation to be paid by the promoters of an undertaking “regard shall be had not only to the value of the land to be purchased or taken, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of such power.”

The Plaintiff was the owner of lands within the meaning of this clause in respect of the causeway which was taken away from him. It is quite immaterial whether the soil of the causeway belonged to him, or he had merely an easement over it; for, by the 4th

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section of the *Thames Embankment Act*, the word “lands” is to include easements, interests, rights, and privileges in, over, or affecting lands; and the 27th section of the same Act empowers the Metropolitan Board of Works to appropriate, by grant or demise, any reclaimed land, &c., to any owner of lands now situated on the present left bank and river frontage of the River *Thames*, in front whereof the said intended embankment shall pass as aforesaid, in consideration of and in lieu, in whole or in part, of the compensation which such owner or person may be entitled to claim for the damage, if any, to be sustained by him by loss of river frontage or otherwise, by reason of such embankment or roadway or other the exercise of any of the powers of the Act.

7H250 This section contemplates two descriptions of damage likely to be sustained by the owners of lands on the bank and river frontage of the *Thames*—one by loss of the river frontage; the other in any other manner, by reason of the embankment or other the exercise of any of the powers of the Act.

It seems to me to be quite clear that the umpire was entitled to consider not only the damage which the Plaintiff sustained by being deprived of the causeway, but also whether he was entitled to compensation in respect of damage otherwise sustained by reason of the embankment. Now, if he was of opinion that *Montagu House* was depreciated in value as a residence by reason of the proximity of the embankment, and of all the consequences of its use as a public highway, he was bound to give the Plaintiff some compensation, and the amount proper to be awarded was entirely for him to determine.

It can hardly be doubted that in addition to the damage sustained by the loss of the river frontage the house must have been “injuriously affected”—*i.e.*, depreciated in value—by the interposition between it and the river of an embankment to be used as a public highway; and this seems to bring the right to compensation within the very words of the 27th section of the special Act, because it is a damage otherwise than by loss of the river frontage by reason of the embankment or roadway.

It is unnecessary to consider the cases of *The Hammersmith Railway Company v. Brand* (1) and *The City of Glasgow Union*

(1) Law Rep. 4 H. L. 171.

Railway Company v. Hunter (1), and other cases which were cited in argument, because their applicability to the present case depended upon that part of the evidence of the umpire which I think ought to be struck out as inadmissible.

The only question then arises upon the award itself—whether the umpire had any power to give compensation for the damage by the depreciation of the mansion-house, lands, tenements, and hereditaments, by the otherwise injuriously affecting the same by the execution by the Defendants of the said works and by the exercise of the powers of the Act. Now, he was authorized, both by the special Act and by the *Lands Clauses Act*, to give compensation if the premises were injuriously affected—a fact which it was the duty of the umpire to ascertain and determine.

He has determined it, and awarded compension in respect of the damage thereby sustained by the Plaintiff; and I see nothing in the case to impeach the correctness of his award.

I think that the judgment of the Court of Exchequer Chamber must be reversed.

LORD WESTBURY:—

My Lords, I concur entirely with the majority of the Judges in the point relating to the admissibility of the evidence of the umpire, and also with respect to the limit to which the right of examining the umpire ought to be carried. On the other point, I must confess that on this occasion, as on some others (2), I do not concur in the principles which have been established. But it would be useless to enter into that discussion, as I understand that the majority of your Lordships is, on that point, in harmony with the opinion which has been expressed by my noble and learned friend who has just addressed the House; and therefore I concur in the judgment proposed to be pronounced.

LORD COLONSAY:—

My Lords, I entirely concur in the judgment proposed to be delivered on both grounds. First, as to the competency of ex-

(1) Law Rep. 2 H. L., Sc. 78.

175–200; *The Glasgow Union Railway Company v. Hunter*, Law Rep.

(2) See *Ricket v. The Metropolitan Railway Company*, Law Rep. 2 H. L.

2 H. L., Sc. 78–85.

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amining the umpire, I think the distinction has been well drawn, and the opinions of the majority of the Judges are right. And in regard to the other part of the case, I think that my noble and learned friend now on the woolsack (Lord *Chelmsford*) has stated the most conclusive reasons for the judgment he has proposed to pronounce. I therefore do not think it necessary to take up your Lordships' time by stating particularly the grounds on which I have arrived at the same conclusion.

LORD CAIRNS:—

My Lords, I must express my own sense of the obligation, and I am sure there is the same feeling on the part of your Lordships, to the learned Judges who have favoured us with their opinions upon this very important case. I own that, speaking for myself, both as regards the extent to which the evidence has been challenged as receivable, and as regards the other points in the case, I should have felt great hesitation in coming to the conclusion at which I have arrived had I not had the advantage of the concurrence of so large a majority of the learned Judges.

As regards the reception of the evidence, in my opinion the line has been most properly and accurately drawn by Mr. Baron *Cleasby*. It appears to me that upon every point which may be considered to be a matter of fact with reference to the making of the award, the evidence of the arbitrator or umpire was properly admissible. He was properly asked what had been the course which the argument before him had taken—what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found upon the face of that written instrument.

My Lords, upon the other part of the case, I own I have had less doubt than I had with regard to the extent to which the evidence was receivable. It has appeared to me throughout that the property of the Plaintiff in Error in this case was what is

commonly called riparian property. The meaning of that is, that it had a water frontage. The meaning of its having a water frontage was this, that it had a right to the undisturbed flow of the river, which passed along the whole frontage of the property in the form in which it had formerly been accustomed to pass. That being the state of things, this water frontage, with these rights, which the Plaintiff in Error possessed, were taken for the purposes of the Act. Beyond all doubt the water right was a property belonging to the Plaintiff, for which compensation was to be made, and it was for the arbitrator to assess the compensation to which the Plaintiff was entitled upon that footing.

Now it is quite true that some difficulty might have arisen in consequence of the wording of the claim put forward by the Plaintiff in Error. In that claim undue weight, as it seems to me, is laid upon the possession of the causeway, that is to say, upon the one point in the whole frontage by means of which, for the time being, he enjoyed access to the water in a particular and convenient way. But it seems to me that his claim is quite large enough to cover the damage to the whole of his interest, whatever that interest might be; and that interest, it appears to me, was a claim to a water right along the whole of the frontage.

Then, that being so, when the arbitrator came to consider that claim, it seems to me that it was entirely open to the arbitrator to say what the value of it was. It was impossible for the arbitrator in estimating that value, to reject from his mind the consideration of the entire depreciation of value which the property would be subject to by reason of its being deprived of that water right. If we are to look at the whole of the evidence, it appears to me that that is nothing more than what the arbitrator says.

Upon these grounds it appears to me that the motion which has been submitted to your Lordships is entirely correct, and that judgment should be given for the Plaintiff in Error.

*Judgment of the Court of Exchequer Chamber
reversed.*

Lords' Journals, 30th April, 1872.

Attorneys for the Plaintiff in Error : *Nicholl, Burnett, & Newman.*

Attorney for the Metropolitan Board of Works : *W. Wyke Smith.*

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THOMAS JACOBS	AND	{	PLAINTIFF
			IN ERROR;
WILLIAM SEWARD		{	DEFENDANT
			IN ERROR.

Tenants in Common—Trespass—Trover—Account—Amendment.

Where two persons are tenants in common of a field, the merely putting, by one of them, a lock upon the gate (not shewn to be kept locked) will not constitute an ouster so as to enable the co-tenant in common to maintain trespass. There must, for such a purpose, be other circumstances attending the act.

In order to enable one tenant in common to maintain trover against another, there must not merely be a carrying away of the property, but such a carrying away of it as will disable the party complaining from having the lawful use or benefit of the property, or there must be the destruction of it.

A. and *B.* were, without the knowledge of *C.*, tenants in common of lands. *C.* had held them under *A.* In March, 1867, *C.* received from *B.* notice to quit at the end of six months. He did not quit, but afterwards made an agreement with *A.*'s agent for the renewal of the tenancy, continued the cultivation of the land, and paid the rent under the new lease. While *C.* was still in possession *B.* demised the premises to *D.*, as from March, 1868, for six months. In June, 1868, *D.* entered the land, cut the grass, put a lock on the gate, and carried away the grass, and stacked it as hay:—

Held (assuming *C.* and *D.* to be tenants in common), that these circumstances did not amount to an ouster, so as to enable *C.* to maintain trespass against his co-tenant in common, *D.*, nor to a destruction of the common property so as to enable *C.* to maintain trover for the grass—but that his only remedy was to be sought under the 4 Anne, c. 16, s. 27, by a proceeding for an account.

The Court below refused to allow an amendment of the declaration by converting the action into one for an account under that statute:—

Held, that the refusal was right.

THIS was an appeal, brought under the provisions of the *Common Law Procedure Act*, 1854, against a decision of the Exchequer Chamber, which had confirmed a previous decision of the Common Pleas.

The Plaintiff was a farmer residing at *Southall*, and had occupied three closes of grass land at *Drayton Green, Ealing*, as a yearly tenant, under a Miss *Lawrence*, and had paid rent to Messrs. *Snell*, her agents. The lands were really possessed by Miss *Law-*

rence and a Miss *Senior* as tenants in common, but of that the Plaintiff had known nothing. On the 22nd of March, 1867, the Plaintiff received a note from Messrs. *Garrow & James*, who stated that they were "instructed by Miss *Lawrence* and Miss *Senior* to put an end" to his tenancy of "their lands and premises at *Drayton Green*" at the next Michaelmas. On the 26th of September the Plaintiff received from Messrs. *Snell*, the agents of Miss *Lawrence*, but, as it appeared, without the knowledge or assent of Miss *Senior*, a letter informing him that Miss *Lawrence* was willing "to let him the fields at *Drayton Green* on a yearly tenancy of £36 a year." On the 12th of October, 1867, Mr. *Senior* wrote (in his own name) to the Plaintiff a letter reminding him of the notice to quit, and requiring him to leave at once. On the 15th of October the Plaintiff wrote to Messrs. *Snell* an answer to their offer, accepting it, and on the same day wrote in answer to Mr. *Senior* that he had "accepted the offer made to me by Messrs. *Snell*." On the 16th of October Mr. *Senior* wrote in reply, "Miss *Lawrence* has no authority to continue you a tenant without my consent, as I have an equal interest in the land with her;" and repeating his desire that the Plaintiff would quit possession at once. On the 11th of November, 1867, the Plaintiff paid Messrs. *Snell* the sum of £12 as the half-year's rent, on the old holding, due at Michaelmas, 1867, and on the 20th of April, 1868, paid them £18 as the half-year's rent on the new holding, due at Lady Day, 1868. He continued in possession, and cultivated the land until the 23rd of June, 1868, when the Defendant, acting under the authority of Mr. *Senior*, who had let the land to the Defendant as from the 29th of March, 1868, to the 29th of September, 1868, entered into possession of the field and put a lock on the gate, and cut the growing grass and carried away the crop. The Defendant opened the gate for the Plaintiff's son to take away the hay of a former year. In July, 1868, the Plaintiff brought an action against the Defendant, and the declaration contained a count for the alleged trespasses, and a second count in trover for the grass. The Defendant pleaded not guilty, and several other pleas, justifying under the authority of Mr. *Senior*, and setting up the demise to himself from Mr. *Senior* for six months, from March, 1868. Issue was joined on these pleas, and the case came on to be tried before Mr. Justice *Brett*, who per-

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mitted the pleas to be amended by substituting the name of Miss *Senior* for that of Mr. *Senior*. The facts above stated were proved, and it was then objected that no action for the removal of growing crops could be maintained by one tenant in common against another upon such evidence as had been adduced in this case, and the learned Judge was asked to direct a nonsuit. He would have done so, but that *Benington v. Benington* (1) was quoted from *Roseoe* on Evidence (2) (where it was wrongly stated), by the authority of which he conceived himself to be bound, and he therefore directed the jury to find a verdict for the Plaintiff. The damages were assessed at £55 for the hay and at £12 for the aftermath, making together £67, for which the verdict was entered. His Lordship, however, reserved leave for the Defendant to move to enter the verdict in his favour, and a rule for that purpose having been obtained it was made absolute (3). This was afterwards affirmed in the Exchequer Chamber, and this proceeding in Error was then brought.

Mr. *Gibbons*, and Mr. *Curtis Bennett*, for the Plaintiff in Error:—

Jacobs here was tenant, and so continued notwithstanding the notice to quit. That notice was only given by one of the landlords, and *Jacobs* could not act on it with certainty; it was therefore bad: *Right d. Fisher v. Cuthell* (4). A subsequent recognition of it will not make it good: *Doe d. Mann v. Walters* (5); *Doe d. Lyster v. Goldwin* (6). Here Miss *Lawrence* let to the Plaintiff, and there was nothing to preclude him from being considered as the only lawful tenant of the lands under the only lawful landlady.

But, assuming that there was a tenancy in common, he had a right to maintain this action, for though upon the dictum of *Coke* (7) it might be said that a tenant in common could not maintain trespass against his co-tenant, it is clear that that dictum was too widely expressed, and that where there was an actual ouster trespass would lie, and there was nothing to prevent one

(1) Cro. Eliz. 157.

(2) 11th Ed. p. 567.

(3) Law Rep. 4 C. P. 328.

(4) 5 East, 491, 497.

(5) 10 B. & C. 626.

(6) 2 Q. B. 143.

(7) Co. Litt. 199 b.

(21st Nov 1870) 186.

tenant in common from maintaining trover where the co-tenant had converted to his own particular use the common property: *Goodtitle v. Tombes* (1). That he had done here.

If the title of Miss *Senior* accrued while the tenancy of the Plaintiff was in existence she could only take subject to that tenancy, while on the other hand, if her title existed before his tenancy commenced, there would have been acquiescence on her part, and consequently estoppel as against her. [LORD WESTBURY:—Where is there any authority for there being an estoppel here?] The Plaintiff had occupied these three closes of land for some years; had regularly paid rent for them to Miss *Lawrence's* agents, and had no notice of any other person being his landlady, or having an interest in the land. If Miss *Senior* had any title or interest therein, she ought to have asserted it. She did not do that; the first intimation the Plaintiff had of any other person claiming to have an interest in the land was from the notice to him to quit, given in the name of Mr. *Senior*, who really had no legal interest whatever in the land. Under these circumstances, the tenancy of the plaintiff must be held to have continued, and that invalid notice had no effect upon it. *Right d. Fisher v. Cuthell* (2); where Lord *Ellenborough* said (3), "It is a notice to defeat an estate; the person, therefore, to whom it is given ought to be assured at the time he receives it," that he can act upon it with safety. "But if only two of the three lessors joined in the notice, how could the Defendant be assured of this? How could he be assured that the third might not disavow the notice afterwards, and claim the Defendant still as a tenant to him? But it is said that the third suffering the ejectment to be brought in his name is a ratification of the others' authority. But a ratification given afterwards will not do in this case, because the tenant is entitled to such a notice as he could act upon with certainty at the time it was given." Here Miss *Senior* must (as against herself) be taken to have acquiesced in what had been done by Miss *Lawrence*; and *Pickard v. Sears* (4) shewed that where one person wilfully caused another to believe a certain state of things, he could not afterwards aver, against that

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(1) 3 Wils. 118.

(2) 5 East, 491.

(3) 5 East, 497.

(4) 6 Ad. & E. 469.

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other, another state of things. [LORD WESTBURY:—That must be—induced with an object.] No; for if any person by actual expressions or a course of conduct, whether intended so or not, induces another to infer the existence of an agreement, and to act upon such inference, the party using the language, or so conducting himself, cannot afterwards gainsay the reasonable inferences from his language or conduct: *Cornish v. Abington* (1). In that case the Judges expressed the opinion that “wilfully” in *Pickard v. Sears* meant nothing more than “voluntarily;” and the doctrine, without that restriction of “wilfully,” had previously been adopted by Baron Parke in *Freeman v. Cooke* (2). Here a reasonable man would have been justified in believing that the only person he had to deal with was Miss *Lawrence*, or her agent, who was, as Lord *Ellenborough* said in *Right v. Cuthell* (3), the only authority competent at the time. *Doe d. Mann v. Walters* (4) laid down the same doctrine.

Assuming, for argument's sake merely, that there was here a tenancy in common, the tenant in common who took possession of the estate to the exclusion of his co-tenant was guilty of an ouster, and was liable to be charged an occupation rent: *Pascoe v. Swan* (5). The principle there acted on must govern the present. *Henderson v. Eason* (6) is not an authority against the Plaintiff here, for that case depended on its own particular circumstances; the reasoning of the Court there is in the Plaintiff's favour. Examples were there put of one tenant in common bearing all the expenses of cultivation, as to which it was, of course, held that he was entitled to repayment, and was liable in account for no more than he had “received” in excess of his share. Here there was no such expense borne by the Defendant, who had turned the Plaintiff out of possession, and had possessed himself of the whole of the crop which the Plaintiff had cultivated. He had not only taken more than his share, he had taken everything, not being entitled to anything.

As to the taking of the crop, it is clear that trover is maintainable. The mode in which it was taken amounted to a destruction

(1) 4 H. & N. 549.

(2) 2 Ex. 654.

(3) 5 East, 491.

(4) 10 B. & C. 626.

(5) 27 Beav. 508.

(6) 17 Q. B. 701, 718.

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of it so far as the Plaintiff's interest was concerned ; it was as much destroyed for his purposes as if it had been given as food for cattle. Though the case of *Barnardiston v. Chapman* (1) appears unfavourable to the Plaintiff, yet the principle there stated is really in his favour. That principle was, that if one tenant in common destroyed the thing which was the subject of the common property, trover could be maintained against him. Here the Defendant did, so far as the interest of the Plaintiff was concerned, destroy the common property. He cut the grass and carried it away : so far as the Plaintiff was concerned, it was destroyed. Now that case distinctly laid down the principle that the destruction of the common property would give a right to maintain trover, and, therefore, warranted the present action.

Here the Defendant possessed himself of the crop and aftermath, and took all away entirely, so that, as far as the Plaintiff was concerned, it was destroyed. This must now be taken to have been found by the jury, the value of both being given as damages. The possession of the crop and of the aftermath shews the exclusive possession of the land from which they were derived, and so makes out the ouster and expulsion. The ouster is farther proved by the finding that the Defendant had taken possession of the fields and put a lock upon the gate ; and even the fact that the Defendant had opened the gate to let the Plaintiff's son take away the hay of the preceding year is proof of the assertion of exclusive possession on the part of the Defendant. Where facts such as these existed, as they did in *Cresswell v. Hedges* (2), trespass was maintained by one tenant in common against another. So in *Murray v. Hall* (3) it was held that trespass *quare clausum fregit* might be maintained by one of several tenants in common against his co-tenant, where there had been an expulsion. There *Hart*, one of the tenants in common, surrendered his interest to the landlord, the Defendant, who thereupon became tenant in common with the rest, and then the Defendant entered and expelled them. This act of expulsion being proved, it was held that trespass lay, and that the co-tenancy was no defence to the action. And in *Mayhew*

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(1) Bull. N. P. 34-35; but more fully stated in *Heath v. Hubbard*, 4 East, 121.

(2) 1 H. & C. 421.

(3) 7 C. B. 441.

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v. *Herrick* (1) it was expressly recognised that trover would lie where there was a total destruction of the property. That was so here; so that even if these parties were to be treated as tenants in common, this action was maintainable. [THE LORD CHANCELLOR intimated that their Lordships thought that these parties must be considered as tenants in common.] It is plain that the Plaintiff has suffered a great wrong; and if the declaration in its present form is wrong, he ought to be allowed to amend.

Mr. *Bulwer*, Q.C., and Mr. *Lumley Smith*, for the Defendant in Error:—

The learned Judge at the trial would have directed a verdict for the Defendant but for the mistake in *Roscoe* on Evidence as to *Benington v. Benington* (2). Take the case as it stands now. There is no estoppel which can affect the rights of Miss *Senior*; and, assuming that there was a tenancy in common, it is impossible to contend that this form of action is maintainable. There was here no destruction of the chattel; it was merely removed. The Plaintiff might have followed it and asserted his title to it. The grass was removed from the field, but it was stacked, and continued in existence. The case of *Fennings v. Lord Grenville* (3) really decides the present. That was a case respecting the property in a whale, which had been struck by one person and killed by another, who cut it up, and took all the bone, oil, and blubber to himself. After much debate upon the evidence, the Court treated the two parties as tenants in common, and held that one tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter has so disposed of it as to render it impossible that the former should ever take it and use it. That certainly was not the case here: the grass was stacked, and could have been taken possession of and used. Then, again, in that case it was decided that the conversion of a chattel by a tenant in common to its general and profitable application, though it may change the form of the substance, is not such a destruction of the subject-matter as to prevent the use of it in its altered state, and therefore creates no right of action. That shews that cutting, carrying the grass,

(1) 7 C. B. 229; 18 L. J. (C.P.) 179.

(2) Cro. Eliz. 157.

(3) 1 Taunt. 241.

and stacking it, did not amount to such an act of conversion as to constitute trover. Mr. Justice *Chambre* said: "There must be that which amounts, as it were, to an ouster; so that a tenant in common who commits it cannot account. Nothing of that sort subsists here." That case was fully warranted by all the authorities, as collected in the notes to *Wilbraham v. Snow* (1). In *Mayhew v. Herrick* (2) there was a real conversion by a sale of different parts of the property to different persons, so that the partner could never repossess himself of them. And in *Barnardiston v. Chapman* (3) the vessel was taken by force from the Plaintiff, sent out on a foreign voyage and lost, the act done put it out of the power of the tenant in common to have the thing again, and so trover was maintainable. But where that is not so, trover cannot be maintained. Even the secret removal of chattels by one tenant in common for the purpose of selling them and applying the proceeds to his own use, does not amount to a conversion, or give his co-tenant a right to maintain trover: *Jones v. Brown* (4). The grass here was fit to be cut, and *Martyn v. Knowllys* (5) decided that where one tenant in common cut down trees that were of a proper age and growth for being cut, an action in the nature of waste could not be maintained against him by his co-tenant (6).

No point was made of an alleged ouster in the Court below, and in fact there was no expulsion or ouster so as to found an action of trespass. A lock was put on the gate, nothing more. That was no expulsion of the Plaintiff, but might have been an act for the benefit of both parties, while the opening of the gate for the Plaintiff's son shewed that when he properly required it he was allowed to enter. What amounts to ouster depends on the circumstances of each particular case. Here there was no ouster, and the mere perception of the rents and profits by one tenant in common will not amount to an ouster, or give to the other a right of action against him.

The Plaintiff here is not without remedy if he has suffered wrong; he cannot maintain trover or trespass, but may proceed

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(1) 2 Wms. Saund. 47 g.

(2) 7 C. B. 229; 18 L. J. (C.P.)

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(3) Stated in 4 East, 121.

(4) 25 L. J. (Ex.) 345.

(5) 8 T. R. 145.

(6) See *Bailey v. Hobson*, Law Rep. 5 Ch. App. 180.

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under the Statute of *Anne* for an account. But that must be a new proceeding.

Mr. *Gibbons* replied.

THE LORD CHANCELLOR (Lord *Hatherley*) :—

My Lords, the Appellant in the present case complains of a decision of the Court of Exchequer Chamber.

The whole case turns simply upon this, what are the rights of a tenant in common against his co-tenant in common, in respect of acts by which that co-tenant in common takes possession either of the land or of chattels connected with the land?

In the case in question the subject-matter in dispute consists of three fields situated in the neighbourhood of *London*, used for the purpose of growing crops of grass to be made into hay. A question was raised on the part of the Plaintiff in Error upon the special facts which have been found in the case, as to whether or not the parties did hold as tenants in common? Under all the circumstances of the case we thought that that question was really not open to the Plaintiff in Error in the present controversy. The whole case seems to have proceeded in the Court below upon the footing of their being tenants in common. The verdict of the jury did so; and the point reserved for argument was expressly whether or not, the parties being tenants in common, an action of this kind would lie.

The action was in trespass with a count in trover. The alleged trespass on the part of the Defendant is this, that he being one tenant in common entered upon the land in question and there made the existing crop of grass as it stood into hay and carried it off. And farther it is also said, that he in like manner dealt with the aftermath. The question upon that is whether, the finding going simply to the taking it, and the carrying it away, there is a foundation for an action either of trespass or of trover.

Now, as regards the question of trespass, it appears to be perfectly settled (there is really no controversy between the counsel in the case upon that part of the matter) that unless there be an actual ouster of one tenant in common by another, trespass will not lie by the one against the other so far as the land is concerned.

Therefore, what we have to look at in the findings before us is this, whether or not there is anything stated which leads to the conclusion that the Plaintiff was ousted by his co-tenant.

It appears to me that there is not a single particle of evidence or circumstance of fact found in the case which would justify us in arriving at such a conclusion. All that is alleged that is approximate to it is this, that one tenant in common carried away this crop, and that he put upon the gate which was there, a lock. It is found expressly that there is no evidence as to whether that gate was always kept locked or not. The only circumstance that is supposed to lead to that inference is, that there is a finding that the Defendant did allow the Plaintiff's son to enter, or (as the expression is) did "open the gate to the Plaintiff's son" to enable him to go upon the land to carry off some former crop which existed upon the land. But even if there had been a finding that the gate was locked, that would not have been sufficient unless it had been shewn that the Plaintiff was excluded by that locking, or that on some occasion when he applied to have it opened it was not opened. The locking was essential if the grass was to be converted into hay, in order to prevent its being stolen and carried away by other persons during the course of the night, these fields being in the neighbourhood of *London*. Nothing whatever is said about what the object and intent of that putting on the lock was, and nothing is said whatever to the effect of the Plaintiff being thereby excluded, or of his ever having made application and having been refused entrance, nor is it said that when the gate was opened to the Plaintiff's son by the Defendant to allow him to enter, there was any difficulty upon the subject, or that anything passed between the parties which shewed that the intention of putting the lock there was to exclude the co-tenant in common. Therefore, so far as trespass is concerned, it appears to me to be idle to talk of trespass as a consequence of a man making hay upon his own field—for it is his own—or a moiety of it at least, and no definite portion of it is mapped out as his moiety. It might just as well have been said if the Defendant had made hay upon two fields out of the three, that as the three fields were held in common, that would be an exclusion of the Plaintiff from the property, as it can be said from any of the circumstances that I find here stated, that

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the inference of exclusion is to be drawn, because he made the hay off the three fields. No remonstrance is alleged, nor any interference on the part of the Defendant with the Plaintiff, nothing but the fact that the co-tenant made hay.

The question, then, is, whether that making of hay by one tenant in common was in any way unlawful. The case of the whale, which was cited at the Bar, is really a case expressly in point. That is the case of *Fennings v. Lord Grenville* (1). The Defendant there being a co-tenant in common of a whale, his servant turned all the whale's fat and blubber into oil, and appropriated them and the bone to himself, and the question was, whether trover would lie in such a state of circumstances. That being the question between the parties, it was held that trover would not lie in that case, because the very purpose of capturing a whale was to turn it into oil. The co-tenant in common was therefore doing nothing that was illegitimate in the use that he was making of the whale. The question whether or not the Plaintiff would be entitled to claim part of the profit under the statute of *Anne*, would be a very different question.

So long as a tenant in common is only exercising lawfully the rights he has as tenant in common, no action can lie against him by his co-tenant. Now it is perfectly lawful for a tenant in common to make hay, for somebody must make it, just as it is lawful for a tenant in common of a whale to make the blubber into oil. That is a perfectly legitimate purpose. It does not signify whether one or other of the tenants in common made use of it, it being made use of in an ordinary and legitimate way. No trover would, therefore, lie against the co-tenant in respect of his having done what he did.

The cases in which trover would lie against a tenant in common are reducible to this. They are cases in which something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights. There was the case of a ship being taken possession of by one tenant in common and sent to sea without the consent of his co-tenant. In

(1) 1 Taunt. 241.

that case it was held that the property was destroyed by the act of one tenant in common, and therefore trover would lie in respect of the co-tenant's share. But where the act done by the tenant in common is right in itself, and nothing is done which destroys the benefit of the other co-tenant in common in the property, there no action will lie, because he can follow that property as long as it is in existence and not destroyed. If it is sold, another question arises under the statute of *Anne*.

There was also another case which pressed upon us, *Mayhew v. Herrick* (1), and that was a case where a sheriff seized the common property of partners, and sold it for the benefit of one of their number. There the peculiar circumstances made it a conversion by one tenant in common against another, and so trover would lie. The sale there was not using the partnership property in the manner in which it was proper to be used for the benefit of the tenants in common. But that was not in the least like the case of making hay out of a field or making oil out of a whale. As long as the tenant in common is confining his use of that property to its legitimate purpose trover will not lie against him. But the moment he steps from the legitimate use to that which is illegitimate, as the sheriff seems to have done in that case by disposing absolutely of the common property as if the one partner had been the sole owner, trover will lie.

As regards the statute of *Anne*, that statute was intended to remedy a grievance which seems to have existed under the common law, namely, that inasmuch as trover would not lie, there appears, until the statute of *Anne* was passed, to have been great difficulty in a tenant in common getting his just rights with regard to that property which was his in common, but with respect to which he had not received his share. Accordingly the statute of *Anne* enacted that there should be an account, on behalf of one tenant in common against the other co-tenant in common, in respect of anything that he had received beyond his just share, and the remedy is there pointed out for taking that account. That was a totally different transaction. Here all that appears upon the findings is that the grass was made into hay, as it was always intended

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(1) 7 C. B. 229; 18 L. J. (C.P.) 179.

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to be, and it was carried off. What happened beyond that is wholly undetermined by the findings in the case. We have no right to assume that it was destroyed by being eaten by cattle, which was one mode suggested in which it might have been disposed of. But we have no right to assume that, any more than to assume that it was stacked upon the co-tenant in common's premises, and was there ready to be disposed of and shared between the two co-tenants in common when the proper time for sharing came. If it had been sold, the remedy was not by an action of trover, but under the statute of *Anne* for an account.

My Lords, it is very lamentable when persons mistake their rights, but one cannot, I am afraid, aid them by saying that though the remedy has been totally mistaken, the party shall be allowed to proceed in another form by way of amendment. When, as in this case, a totally different course of action has been pursued from that which is pointed out by the law, the party cannot be assisted in arriving at his right. The Plaintiff has chosen to bring an action of trover, and he now says, I ought to be allowed to amend by turning this action into an action of account under the statute of *Anne*. But the whole case is entirely different. The whole question before the jury would be different, and the whole account would have to be taken upon totally different principles from anything that was done before the jury. We should save no expense to the parties on either side by allowing such a course to be taken, and at the same time it would be impossible to retain the present verdict of the jury. That verdict has been founded on a notion of tort. Of course, any expense of making the hay, and so on, cannot have been included in the computation of damages, which expenses would have to be allowed in a proceeding under the statute of *Anne* to the person who made the hay. It appears to me, therefore, that the Plaintiff, having mistaken his course throughout, cannot now be assisted. The order which he seeks to reverse was properly made, and we can only dismiss the appeal with costs.

LORD WESTBURY:—

My Lords, if there is any miscarriage in this matter, I think it must be attributed to the want of definite and certain state-

ments in the special case which is the subject of the present appeal.

Now the first point that was made on behalf of the Appellant was this. That inasmuch as it appears that Miss *Lawrence*, who was one of the tenants in common of the closes in question, originally demised the entirety of the closes to the present Appellant, it was contended by the Appellant that, in fact, the lease so made by Miss *Lawrence* bound the other tenant in common, Miss *Senior*, and that Miss *Senior* had estopped herself by her conduct from challenging that lease as not being a lease of the entirety, but a lease confined to Miss *Lawrence's* moiety alone. Now there is not a single fact found in the case from which any such estoppel can be drawn as a conclusion of law. There is nothing found in the case to warrant the supposition that Miss *Lawrence*, in demising the entirety of the land, acted with the knowledge and concurrence or with the authority of the other tenant in common.

That being so, the facts that are found are these: that the present Plaintiff in Error being in possession by virtue of the demise made to him by Miss *Lawrence*, the Defendant in Error, acting under the demise made to him by Miss *Senior*, took possession of the lands, cut the grass growing thereon and made it into hay, and took it away from the premises. The question that your Lordships have to determine is, whether the facts as stated in that part of this special case amounted to an ouster of Miss *Lawrence's* tenant by the tenant of Miss *Senior*, that lady, it appears, having assumed the power to grant a lease of the entirety of the lands to the Defendant. The Plaintiff, it is said, continued in possession of the lands, and expended money in cultivation of the same (that is, under the demise from Miss *Lawrence*) until the 23rd of June, when the Defendant, acting under the authority of the lease made to him by Miss *Senior*, entered on possession of the fields, put a lock upon the gate, and cut and carried away the crop of grass. The putting of the lock on the gate was a perfectly immaterial thing, because it is not found that the lock was ever used, and, as it would appear, when the Plaintiff in Error wanted to enter upon the land he was at liberty so to do, because it is said that the Defendant opened the gate for the Plaintiff's son. Nothing amounting to an exclusion of the present tenant is stated; nothing

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that shews that, independently of the taking away of the crop of grass, anything was done to oust the Plaintiff in Error from the possession, or from an interest in the land.

The question comes, therefore, to this, as is stated in a subsequent part of the case. Whether one tenant in common can maintain trespass against his co-tenant for the removal of growing crops. The removal of the growing crops certainly does not amount in law to an ouster of the tenant in common. The removal of the growing crops may be perfectly consistent with the enjoyment by both, and consistent with the other tenant in common having a right to an account or to get the benefit of his share of the growing crops so removed, without the necessity of alleging, as without the fact being, that he has been at all ousted from the land. If, therefore, the present Appellant claims a right to have judgment in his action of trespass on the ground of his having been ousted, there is nothing found in the case which in law or fact would amount to an ouster.

Now the jury, under the direction of the learned Judge (who was misled by a false reference) found a verdict for the Plaintiff, and the damages were assessed at £67. The questions, therefore, which will arise are two. Can the verdict for the Plaintiff, the present Plaintiff in Error, in his action of trespass be maintained? And can he be entitled in his form of action, namely, of trover, to recover the value of the growing crops, or half of the value of the growing crops, on the ground of his having been ousted from the land.

It is undoubtedly settled law that he cannot maintain trespass unless there is a case of ouster, and, as I have already observed, no facts amounting to a case of ouster are stated in the special case. But then it follows clearly he is not entitled to trover for the entirety of the growing crops. All that he could allege would be, that he was entitled in some form or other, either in Law or in Equity, to have one-half of the value of the growing crops. But the form of action that he has adopted is not consistent with that claim.

An application was made to change the form of action into an action of a perfectly different character, namely, an action for an account under the statute. That the learned Judges in the Court below held could not be done, because the form of proceedings

was entirely different in its character. My Lords, I entirely concur in that decision. The result, therefore, is, that the Plaintiff, by the form of action he has adopted, has lost a remedy he might otherwise have had. It is a matter of regret that when the question at issue related only to one-half of £67 these proceedings should have been taken; proceedings which are founded altogether upon a misapprehension of the state of the law applicable to the facts of this case.

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LORD COLONSAY :—

My Lords, confining our attention, as we must do, to the special case, I certainly cannot find in it any material to enable me to support any of the points which have been made by the counsel of the Appellant. I therefore concur with my noble and learned friends.

*Judgment of the Court of Exchequer Chamber
 affirmed.*

Lords' Journals, 30th April, 1872.

Attorney for Appellant: *T. Heydon.*

Attorney for Respondent: *Harry H. Lawrence.*

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THE OVEREND & GURNEY COMPANY . APPELLANT;

March 18, 19;
April 11, 12.

AND

THOMAS JONES GIBB AND JOHN DARBY }
GIBB } RESPONDENTS.*Company—Directors—Power and Liability—Pleading.*

Facts which may shew imprudence in the exercise of powers undoubtedly conferred upon directors will not subject them to personal responsibility; the imprudence must be so great and manifest as to amount to *crassa negligentia*.

Where the directors to whom these powers were intrusted, and who exercised them, were, by the "Company" which had conferred the powers, afterwards sought to be made responsible for their exercise:—*Held*, that malfeasance or *crassa negligentia* ought to have been distinctly charged.

The bill being defective in that respect:—*Held*, that it could not be sustained.

In a company formed for the purchase of a business where the power to make the purchase was distinctly conferred on the directors, though the character of the business turned out to be ruinous, unless that character was obviously apparent when the purchase was made, the directors will not be personally responsible for making it.

In this case a prospectus was, in the usual manner, issued by the directors, but that prospectus in no way whatever affected the claim of the Plaintiff company to compensation for loss consequent on the purchase of the business, for the company was formed for the express purpose of purchasing the business, and was not induced to take that step by any previously-issued prospectus.

An agent (and the directors here were rather agents or mandatories than trustees) being authorized to do an act in itself imprudent, and one which the principal ought not, as a matter of prudence, to have authorized, is not to be held responsible for the consequences of doing it.

Turquand v. Marshall (1) explained.

THIS was a bill filed by certain persons who claimed to constitute a company called the "*Overend & Gurney Company, Limited*," against the persons originally appointed directors of that company. The present Respondents were the executors of a Mr. *Thomas Augustus Gibb*, who had been one of the original directors. The bill (which is fully set out in the report of the case in the Court below (2), and is frequently quoted in the judgments of their Lordships) stated in substance that a firm of bill-brokers, named

(1) Law Rep. 4 Ch. Ap. 376.

(2) Law Rep. 4 Ch. Ap. 701.

Overend, Gurney, & Co., had existed for many years and attained a very high commercial reputation, and its business was universally supposed to be most successful and profitable; that in 1857 the firm sustained heavy losses, large accounts were due to the firm, and these and certain investments, amounting together to £2,782,879, were regarded by the firm with alarm; that in June, 1865, the partners knew that they were involved to the extent of £2,000,000; that the partners and *T. A. Gibb* devised a project for the formation of a company to take over all the liabilities of the firm, and that an arrangement for that purpose was afterwards made in a memorandum and articles of association; that the memorandum, signed by the Defendants and registered the 12th of July, 1865, contained the following (among other) provisions: "3. The objects for which the company is established are, the receiving of money on deposit, or by rediscount of bills, and the employment and investment of such money, and of the paid-up capital of the company, in the discounting of bills of exchange, promissory notes, and other negotiable securities, and in making advances on loan and investing in securities, and generally the carrying on the business of bill-brokers and money-dealers, as heretofore carried on by Messrs. *Overend, Gurney, & Co.*, at No. 65, *Lombard Street*, in the city of *London*; and with a view to the above objects, the acquisition of such business upon terms to be agreed upon by the directors, and the acquisition, whether by way of purchase, or amalgamation, or otherwise, of such other business or businesses of a like character, and upon such terms, as the directors shall think expedient, and the doing of all acts and things incidental to, or conducive to, the attainment of the above objects." (See, on the subject of an alteration in this memorandum, *Oakes v. Turquand* (1).)

There were also articles of association drawn up in a similar form, and a prospectus, which set forth some of the terms of the purchase, of which this prospectus said they were "terms which in the opinion of the directors cannot fail to insure a highly remunerative return to the shareholders." The vendors were represented as "guaranteeing the company against any loss on the assets and liabilities transferred;" and at the end of the memorandum it was said, "Copies of the company's memorandum and articles of asso-

(1) Law Rep. 2 H. L. 326-329-333.

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ciation, as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company."

The bill then alleged that the directors, in July, 1865, completed the purchase, being aware of the insolvency of the firm, and that two indentures were executed (both of which were fully set out), and the bill charged them to be injurious to the interests of the company; and it was alleged that the second was not mentioned in the prospectus, nor made known to the members of the company, and that if it had been disclosed and the true state of the firm made known to the company, the purchase of the business, at any price, would have been refused. The bill also alleged several other matters of detail (one, that of not taking a sufficient guarantie from the partners of the old firm), leading to great losses on the part of the company, and prayed that the Defendants might be declared jointly and severally liable to make good the losses, that a receiver might be appointed, and for general relief. The Defendants demurred to the bill generally. Vice-Chancellor *Malins*, on the 28th of April, 1869, overruled the demurrer (1); but his decision was afterwards reversed by Lord Chancellor *Hatherley*. The present appeal was then brought.

Mr. *Cotton*, Q.C., and Mr. *W. Stewart Ferrers*, for the Appellant:—

There is no reason on principle why this bill should not be maintained. It is not a bill to make the directors liable in unliquidated damages, but to recover from them that portion of the capital of the company which has been lost by their negligence. They were trustees for the company, and they have acted without that caution which trustees are bound to exercise. The case resembles that of a trustee to whom money has been left to invest for a particular purpose and for the benefit of a particular person, and he has invested it so badly that the purpose of that person's benefit is wholly prevented from taking effect. Where directors or committeemen are supinely negligent of the interests entrusted to their care, and thereby occasion a gross loss, they will be held liable: *Charitable Corporation v. Sutton* (2). That was so here.

(1) Law Rep. 4 Ch. Ap. 707, n.

(2) 2 Atk. 400-406.

[Many parts of the deeds were referred to with the view of shewing that the interests of the company had not been attended to, and, among others, that a sufficient guarantie had not been taken to cover the company against losses from taking over the liabilities of the old partnership.] The company was formed before the prospectus was issued, and the directors must have known before they executed the deeds the true state of things—a state which rendered the purchase of the business and the adoption of the liabilities of the old partnership an absolutely ruinous speculation. When the company was formed power was, no doubt, given the directors to bind the company, but that power was a trust, and the directors were bound to use it with care and discretion, and if they neglected both, they became liable to make good the losses occasioned by their neglect. When they found that the circumstances of the partnership were such that the purchase of the business would not promote, but would seriously injure, the interests of the company, they ought to have declined to make the purchase. If they saw even strong reason to doubt the propriety of making the purchase, they ought to have held their hands until they had called a general meeting of the shareholders and laid the true state of the case before them. Instead of that, so far from giving full information to the shareholders, they kept back all knowledge of the second deed, and nobody doubted that if the shareholders had known of that deed the purchase of the business would have been rejected. [The LORD CHANCELLOR:—The object of the company was to carry on the business of bill-brokers, and to do so by means of purchasing the business of *Overend & Gurney*. There is no charge in the bill that the conduct of the directors was fraudulent, or that they sought or obtained any particular advantage for themselves.] The directors knew that it was believed that the business must succeed. Before they completed the purchase they had learnt enough to know (as the bill clearly sets forth) that such belief was utterly erroneous, and that the guarantie was entirely insufficient. They ought to have acted on this knowledge, or at least fairly and fully to have laid it before the company, to enable the shareholders to act on it.

A bill like the present is maintainable against persons standing

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in the situation of these directors: *The Society for the Illustration of Practical Knowledge v. Abbott* (1).

Sir *Roundell Palmer*, Q.C., and Sir *George Honyman*, Q.C. (Mr. *H. M. Jackson* was with them), for the Respondents:—

The bill contains no allegations of fraud. The case against the Respondents is, therefore, reduced to a charge of want of judgment in doing an act which the company gave them full authority to do. Such a bill is, therefore, of the first impression, and there is no authority shewing that it can be maintained. There was no misrepresentation here; but if there had been, each shareholder deceived by it had his remedy at law, but the whole company could not maintain a bill like this against the directors: *Turquand v. Marshall* (2) is a very strong authority upon that point. The company knew, or had the opportunity of knowing, all the facts, and so had no claim to equitable relief: *Vigers v. Pike* (3). There was no allegation in the bill which shewed a specific duty imposed on the directors, and an intentional, or even negligent, breach of that duty. The bill, therefore, sets out no title to relief.

Mr. *Cotton* replied. *Turquand v. Marshall* had not laid down a doctrine so sweeping as was supposed.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, in this case, which is one of a bill filed by persons constituting the disastrous concern, as it has proved to be, of the *Overend & Gurney Co., Limited*, in order to fix the representatives of a deceased director with the consequences of his having entered into an arrangement for the purchase of the business of the private firm of *Overend & Gurney*, I should not, it being an appeal from a decision of my own, have been anxious to express my own view in the first instance, had I not ascertained that there is no difference of opinion amongst your Lordships on the question which is at issue.

The points which have been laid before us are these:—A company was formed for the express purpose of purchasing the con-

(1) 2 Beav. 559.

(2) Law Rep. 4 Ch. Ap. 376.

(3) 8 Cl. & F. 562.

cern belonging to *Overend & Gurney* as a firm. I say for that express purpose; because, although there is a recital in the articles of association as to the purposes of the company, which states them to be the carrying on of the business of bill brokers, that is qualified by this expression, "carrying on the business of bill brokers as now carried on by the firm of *Overend, Gurney, & Co.*" Then it proceeds to say that with the view of so doing it is intended to purchase that business. And the name and goodwill were, of course, intended to be purchased, for they could never have given the name of "*Overend, Gurney, & Co., Limited,*" to the new company except by the purchase of the business. They could by no possibility have acquired the right of using that well known designation, unless the purchase from the old firm had been made. And the subsequent words which are thrown in, namely, the words which imply a power or an intention also to purchase any other business of a similar character, are merely words which are concomitant with the main act and object for which the company was formed, namely, the purchase of the business of *Overend & Gurney*.

Then it is said, true it is this was the object of the company, which everybody entering into the company understood to be its true intent and object; true it is that in the articles which were entered into on the formation of the company powers are given for the purpose of making this purchase, and that the intention of everybody was to do that. But at that time the firm was considered to be carrying on a first class business; its credit was at the highest possible point, and we, the persons who entered into this company, all thought that we were about to purchase that which would be a flourishing concern, and not one which would be a source of ruin and destruction to us all, at least as regarded the amount of money which we were to invest in the purchase.

Now, the way in which the case is put is, that the directors, who, beyond all dispute, had a clear power and authority to make the purchase, in the course of making it became aware of facts which if they had been known before the formation of the company, or even before the instruments were signed which effectually bound the company in making the purchase, if they had been known to any of the shareholders as they were known to the directors,

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would have stopped at once the purchase, or ought to have made the directors refuse to enter on it. In other words, it is contended, that the directors were placed in such a position by those facts which they ascertained, that they should at once have held their hands, and have done one of two things—it is not very clearly stated what precisely they should have done, but it is said that they should have done one of two things—they should either have called a meeting of the company to ask the opinion of the shareholders on the subject, or should have declined to complete the object for which the company was originally formed, for that the knowledge they had acquired must have shewn them that the intention of all parties in entering into the speculation was one that must entirely fail in its effect, owing to the character of the business and the disastrous condition in which it was found to be. That is really the question that has been raised, and one has to see how, on the face of the bill, it can be held that Mr. *Gibb*, the deceased director, who engaged in this purchase, has made himself answerable for completing it under the circumstances stated in the bill.

Now I begin by saying (as I did in the Court below, and as the Vice-Chancellor did) that it is clear upon this bill, and that, I think, is beyond dispute, that Mr. *Gibb* is not charged with any malfeasance in the shape of corrupt malfeasance. He is not charged with having appropriated to himself any portion of the money of the shareholders, or with having had any indirect benefit from the engagement he entered into. He had nothing to do with the original firm. He was exactly in the position of every other shareholder as to the hope of advantage, or apprehension of possible disadvantage, that might be expected to accrue from making the purchase; and he had, in that respect, an unbiassed mind and judgment. Farther than that, the Vice-Chancellor stated (in which I entirely agree with him) that these gentlemen, Mr. *Gibb* and the other directors, for all that appears on the face of the bill, simply acted in the execution of what they believed to be their duty, however mistaken they may now appear to have been in the view they took. That is, of course, a very great step towards the solution of the question one has to investigate; because the question is then simply reduced to this,—whether or not the directors

exceeded the powers entrusted to them, or whether if they did not so exceed their powers they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into? Was there *crassa negligentia* on their part which, though not charged in words, is, it is argued, shewn by the facts, so that they should be fixed with the loss of the fund intrusted to their hands for the purpose of making the acquisition of the business; was the acquiring of that subject-matter, through the medium of those funds, with the amount of knowledge which the directors had attained, an instance of *crassa negligentia*?

Now the case as to their power stands thus:—The power is given by the 84th section of the articles of association in very plain and explicit terms, and it is of a very large character. We must bear in mind that the object was to purchase this business. That was the sole creative cause of the existence of the company. If it had not been for the purchase of this business the company would never have existed. The articles of association go on to say, “The directors are authorized to purchase or acquire upon such terms and under such stipulations as to guarantie or otherwise, as may be agreed upon, the business of *Overend, Gurney, & Co.* as it now stands.”

Now a larger power can hardly be conceived than that which is thus entrusted to these directors. The expressions “as to guarantie or otherwise,” and “the business of *Overend, Gurney, & Co.*, as it now stands,” put together, convey to my mind the impression that it was meant to purchase the whole thing, including all assets and including all liabilities, and for this reason, that it was not likely that the firm would hand over all its assets if the new company taking all the assets did not also undertake the liabilities; because otherwise the partners would be in the condition of intrusting to others the management of their assets, which assets of course must be the source for the payment of the liabilities. But the parties proceed to purchase the goodwill of the business as it now stands, with this stipulation also, that the directors are to make such arrangements as they think fit “in respect to guarantie or otherwise.” The whole bearing of this contract of

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purchase appears to me to be this: you take the whole concern exactly as it is. In all these concerns there must be that amount of speculation which may require a guarantie. The purchase of any business whatever always consists in your taking the assets of the concern at an amount which is an estimate. The assets cannot be realized, of course, as to their value, except by actual sale. And we all know that in actual business that is an impossibility, because it must break up the concern, and then it would be no longer a going concern. Therefore, you must have estimates of the assets, which may prove insufficient. Lest the assets should prove insufficient for the liabilities, you may want a guarantie. Whatever may be the state of the concern, although it may be apparently flourishing, it is equally certain that you will want a guarantie of the value of certain things which can only admit of being taken at an estimated value. I think the expression "guarantie," which we find here, implies in ordinary parlance rather a personal guarantie than the taking of any security. Those who know anything of these concerns, know that it is not common to give more on the transfer of a business with reference to the value of the property disposed of than a personal guarantie; and the expression "guarantie" is much more ordinarily applied to a personal guarantie than to securities by way of a transfer of property, either land or chattels, or other securities for property.

Now these gentlemen, the directors, having that authority, it does appear to me that all that they did was perfectly within the limits of their power when they purchased the whole business, including all the liabilities and assets, and when they took, as a guarantie of the value of the assets, such security as they did take by that second deed which is in question in this case. It still remains to be seen whether or not there was *crassa negligentia* in so exercising their power; but that they had that power appears to me beyond dispute. I think if anything were wanting on that subject, it is not anything as to their authority; and as regards the company now coming forward to complain, it was announced that this had been done, which I conceive the directors had power and authority to do, namely, that they had taken over the business, and that there was a deed in existence, the deed of covenant, which could be seen. It was also stated in the pro-

spectus (which emanated from the directors, as the company, and was, in fact, in that sense, the act of the company itself when so issued) that the company was formed, as even the deed of association itself shews, for the purchase of this business, and that it was to carry out an arrangement which, it was stated in the prospectus, had been made for the purpose.

It is possible, and Mr. *Cotton* is entitled to put it so, that the true history of the transaction, as derived, of course, from the bill, which is our only source of information, is this:—Some arrangement or other was talked over and entered into between those parties who afterwards formed the company. But if so, it is not asserted that any variation from that arrangement was ever come to. But it is said what was done was not the act of the company: it was done before the company existed. That is a truism. It could not be the act of a nonentity. But the company was formed for the purpose of carrying into effect that arrangement, whatever it was. Mr. *Cotton* says that he does not mean to say that there was any departure from the original arrangement between the first formation of the company and the issuing of the prospectus and the subsequent execution of the deed. Mr. *Cotton's* argument is correct in this point of view, that until the execution of that deed by the directors, of course the company itself was not bound. There was what you may call a *locus pœnitentiæ*, if any *pœnitentiæ* was necessary. The directors could have withheld their assent at the expense and cost of breaking up the company, because the company was formed for this one purpose, and this one purpose only. But that is the extent of the mischief, if any mischief there was, which these directors did, namely, that they carried into effect that which had been (before the company existed) arranged and settled amongst the persons who afterwards formed the company. The directors carried into effect the intention of the company when it was formed, but with the knowledge of facts which are stated in the bill for the purpose of shewing that there was *crassa negligentia* in pursuing that course after the facts had been ascertained. We are not told when those facts were ascertained; we are left in the dark as to that circumstance, which is rather remarkable in a bill of this character. It is stated in the introductory part of the bill that these facts had occurred with

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reference to this flourishing concern, considered by everybody to be a flourishing concern when this company was formed. It is stated in the bill that anterior to the company being formed in 1865, namely, in 1857, a course of somewhat reckless credit had been given to a number of concerns which did not merit such credit, and that thereby a heavy amount of debt had accrued, amounting, I think, at that time to the very large sum of between two and three millions of money, for which the security was very inadequate; that consequently the partners had become alarmed; that in 1861 the partners of the firm, on an investigation of their concerns, found that matters were not in a satisfactory plight, and they called one of the partners, who had hitherto not attended to business, up to *London*, and that he continued to give his superintendence to the concern, though we are not exactly informed what the effect of that superintendence was—whether it diminished the amount of bad debt or not; we must assume that it did not increase it, but things went on in the manner in which they had been going on from 1857—at the worst no increase, at the best possibly not much diminution of the evil which existed in 1857, and that went on until 1865, down to the time of this purchase being made.

Now I will only make one remark upon it, which is this, that in 1865, notwithstanding this amount of debt, the firm was still in high credit, and was believed to be a highly flourishing concern; and that is stated in the bill as among the reasons for the desire to purchase the business. Therefore, although there existed this large amount of ill-secured debts (it does not appear to be absolutely unsecured), still the concern was not broken up by it, nor had its credit been breathed upon, nor was it in any degree damaged with regard thereto, but it went on as a flourishing concern. We are not told that any farther foolish debts of this kind were contracted during that interval, but the result of their having been previously contracted was that in 1865, when the matter came to be investigated, it was seen (as it is averred) that the concern, if it had at that moment stopped, would have found its liabilities exceed by two millions the extent of its assets. I had forgotten that it is distinctly charged, but it is charged in a subsequent paragraph of the bill (considerably after these paragraphs

that relate to the extent of the debt) that this state of excess of liabilities over assets was known to the directors, the Defendants, including Mr. *Gibb*. It is not distinctly stated in the bill when or how it became known; but I will assume for the present purpose that they knew it before they put the seal of the company to the deeds in question. What they would then know would be that, in consequence of arrangements which had been entered into, by trusting persons who ought not to be trusted, this concern, although still believed to be a highly flourishing concern, in so far as the outside public was concerned, was not, at that moment, if there had then been a break up of it, in a condition, from the assets of the firm, to pay all its debts. As to the property of the partners, there is nothing said about that. We are not told anywhere in the bill what amount of property the partners might or might not have, with reference to the value or importance of any guarantee that might be given by them. We are not told anywhere what was the amount of income arising from this business. We are not told anywhere that in reality the sum given for this business was too much. Half a million was given for the goodwill. It is not averred in express words that that half million was too much; we are left to infer it from the facts stated, if that is the legitimate inference from them. But I do not apprehend that it is a necessary inference that because, eight years before the purchase, there had been a degree of imprudence in contracting debt which was still weighing upon the concern, the price that was paid for the concern was a great deal too much. There is nothing on the face of the bill to shew that by good management, and by introducing new blood into the concern, and a large amount of capital to start the concern afresh, free from any difficulties which might press upon it at the commencement, and by managing it in a better way hereafter, and by taking care (on which some reliance was placed in the prospectus) to have a careful set of managers, and by taking prudent precautions in future with reference to the management, the concern might not have been made a flourishing and successful one. There is no averment in the bill that the price paid for the purchase was far beyond the actual value of the concern as a going concern at that moment, nor is there anything that necessarily leads to the inference that so it must have been.

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The way in which that inference is attempted to be raised is this:—They say, you, the Defendants, took two deeds; you took, first, the deed by which the whole concern was handed over *minus* such assets as the purchasers might be willing to omit from those they intended to take over. And in the second deed you rejected the management and control of assets, which you said you would not take over, to the nominal amount of four millions. And with respect to these this arrangement was made: The partners of the old firm were to consider those assets as being subject to their control and management; they were to have the getting of them in, and as they got them in, or as they got any of them in, they were to pay them over. It must be taken from the statements in the bill that the partners were not likely to get in more than a portion of these assets, but no definite portion is mentioned; it is only said that many of the supposed assets were uncertain and without value; but whatever was to be got in, time was to be given for getting it in, two and a half years. That is the nature of the deed. In the first deed the guarantie is given which is spoken of in the second deed, a personal guarantie on the part of the partners with reference to the liabilities not exceeding the assets. The partners of the old firm took upon themselves the getting in of those assets, which were exposed to the difficulty I have spoken of, and when they were got in they were to be paid over to the directors of the company. Farther than that, there was this security given: the whole of the £500,000 was to be dealt with half as money and half as shares. I need not go through the detail of it, but the effect of it was that the £500,000 were not to be paid during the currency of this liability, not to be paid till it should be ascertained whether or not the guarantie was required. Farther than that, provision was also made that the capital of the partners of the old firm as it stood in the books, as a matter of figures, and as a matter of ciphering, amounting to something exceeding a million of money, was to be considered as a thing not to be dealt with as having any existence (if I may use that expression) until the liability should be found not to exceed the assets. They were not to make any claim in respect of that capital until that period should have arrived.

My Lords, these are the facts from which we are asked to infer

that there was *crassa negligentia* on the part of these gentlemen in taking any part or concern in this business whatsoever. Now it appears to me that such an inference is utterly inconsistent with the statements made in this bill, which does not aver any act of misconduct beyond that of imprudence (if the imprudence be shewn by the facts there stated) from which *crassa negligentia* can be inferred. It appears to me, that there being in this bill no allegation beyond these mere bare facts which I have stated, there is no allegation sufficient to charge these gentlemen with such an amount of imprudence in engaging in a concern for their own benefit as well as for the benefit of the rest of the shareholders, as to make them responsible for the loss which has occurred. I think it must be taken (as it is put in the judgment of the Vice-Chancellor), by fair inferences from the statements in the bill, not quarrelled with by the argument of the counsel for the Appellant, that the whole of these directors were acting in the belief that they were discharging their duty. In the facts stated in the bill, for the purpose of giving an exposition of the ruinous character of this purchase in its result, I cannot find a sufficient statement that that ruinous character was so apparent at the time when the purchase was made that it would justify your Lordships in coming to the conclusion that the parties making it, and having full power to make it, acted with such *crassa negligentia* that they can be made responsible for all the loss which has resulted from it. It appears to me that it is quite possible, according to the facts stated in this bill that all might have gone on well. It appears quite possible that out of those assets of four millions something might have been realized—how much, it is impossible, on the statements of the bill, to come to any conclusion upon either one way or the other—except for intervening circumstances which could not be foreseen or controlled; it was quite possible that that concern which from the year 1857, with that amount of bad debt, had gone on nevertheless keeping up a prosperous and extensive reputation in the world, down to 1865, namely, eight years, might have been so relieved from the pressure of those debts by the introduction of fresh capital, which would stave off any immediate possibility of heavy claims falling on the firms without the means of meeting them; and that during the term (of two and a half years), which

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was provided by the second deed, the business might have been carried on with the same amount of prosperity as it had enjoyed up to that time as far as regarded the general reputation which the concern enjoyed, and that by the time of the expiration of that period of two and a half years, such a proportion of the doubtful and bad debts might have been got in, and such a proportion might have been contributed by the then apparently (as far as we have any information in the bill) solvent proprietors of the old concern, in respect of their guarantie, as might have made the whole concern (which if once clear of the weight of debt was manifestly a prosperous one) go on in the same prosperous course as it had previously pursued, as far as regards its reputation.

My Lords, I cannot say, in that state of circumstances, that I see that anything has happened, according to the statements in this bill, which would justify your Lordships in coming to the conclusion that the directors, acting in good faith, although imprudently, acted with such an amount of clear and gross negligence as to justify the proprietors in saying,—that which you have done for us we reject, that which you have done, acting on our behalf, we say has not been done according to those principles which any agent authorized for the purpose of perfecting a purchase for those who trust him with their money ought to act upon, and therefore we will reject the purchase and fix you with the liability, and ask you to replace our funds.

It is perhaps hardly necessary to say it, after the explanation I have already given, but I should like to say one word as regards the case of *Turquand* and *Marshall* (1), which was cited by Sir *Roundell Palmer* yesterday, and referred to by Mr. *Cotton* this morning. I certainly never intended to lay down the strong proposition that a person acting for another as his agent, is not bound to use all the ordinary prudence that can be properly and legitimately expected from any person in the conduct of the affairs of the world, namely, the same amount of prudence which, in the same circumstances, he would exercise on his own behalf. What I did intend to state in that case was, that I could not measure—and I think it would be a very fatal error in the verdict of any Court of justice to attempt to measure—the amount of prudence

(1) Law Rep. 4 Ch. Ap. 376.

that ought to be exercised by the amount of prudence which the judge himself might think, under similar circumstances, he should have exercised. I think it extremely likely that many a judge, or many a person versed by long experience in the affairs of mankind, as conducted in the mercantile world, will know that there is a great deal more trust, a great deal more speculation, and a great deal more readiness to confide in the probabilities of things, with regard to success in mercantile transactions, than there is on the part of those whose habits of life are entirely of a different character. It would be extremely wrong to import into the consideration of the case of a person acting as a mercantile agent in the purchase of a business concern, those principles of extreme caution which might dictate the course of one who is not at all inclined to invest his property in any ventures of such a hazardous character. As I said on the former occasion, so I think now, that this purchase of the concern of *Overend, Gurney, & Co.* must have been a speculative purchase; it was the purchase of a business which must have been known to be exposed to hazard. Men were chosen by the company as their directors, to act on their behalf in the same manner as they would have acted on their own behalf as men of the world, and accustomed to business, and accustomed to speculation, and having a knowledge of business of this character. If we had found any statement in the bill charging distinctly any improper motive or any undue neglect of any circumstance or transaction which ought to have been inquired into by the persons making this purchase, the case would of course have been different—but I do not find a single intimation, from the beginning to the end of the bill, of anything being left undone that ought to have been done by these trustees. On the contrary, the charge is this, and simply this—and therefore all that is cast upon us, as it appears to me, on the present occasion is to ascertain what the result of these facts is—the simple fact is that they did ascertain every fact that was to be ascertained, every fact that was known to other persons was ascertained by these trustees, and the charge is this: it is said, you, the trustees, having ascertained those facts, were placed, by the mere circumstance of your having so ascertained them, in a position in which you ought to have broken up the company, or at least to have told the company that

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the transaction was one in which you must require farther advice or farther powers. I cannot at all agree with that proposition, and I certainly think now, after this second able argument, that no case is made out against Mr. *Gibb*, in which he, or his executor, could be called upon to refund any portion of the moneys which have been lost. I therefore think the proper course will be to dismiss this appeal with costs.

LORD CHELMSFORD:—

My Lords, at the close of the argument on the part of the Appellant I entertained no doubt that the decree of my noble and learned friend ought to be affirmed; but the case being one of importance, and certainly of novelty, I am glad that your Lordships proposed to have the case fully argued before you pronounced a decision.

To my mind the suit is one of a very extraordinary character. The short statement of it is this: It is a bill filed by a company incorporated for the express purpose of purchasing and carrying on the business of *Overend, Gurney, & Co.* against the directors, for having done the act for which the company was formed, and which they were authorized to do. Now there is no charge in the bill of any fraudulent conduct on the part of the directors, or of any breach of duty, or of any negligence, or of their not having honestly done what they considered to be their duty towards the company, the existing shareholders, and those who might become so. Then what is the ground upon which they are sought to be made liable for all the loss which has been sustained in consequence of the failure of the company a short time after it was incorporated? As I understand it, it is this: It is alleged that the directors were trustees for the company, and that in purchasing this business they did an act so improvident and imprudent that it amounted to what is called *crassa negligentia*, and consequently to a breach of trust.

Now there is not in the bill any allegation of negligence, but there is a statement of facts which, of course, are admitted by the demurrer for the purpose of the day, and from those facts a Court of Equity is required to draw certain conclusions which are to make the directors liable for this act of purchase. The bill states that

the business of *Overend, Gurney, & Co.* had been carried on for many years ; that the firm had a high commercial reputation, and that the business in general was considered to be extremely flourishing. In the year 1857 certain losses were incurred by the firm, and in the year 1861 there were certain accounts and debts outstanding, and also certain investments of a rather questionable character, which created alarm in the minds of the partners ; and it appears from the statements in the bill that the firm was insolvent to the extent of £2,000,000. Now I agree with my noble and learned friend, that, with regard to that allegation of the insolvency of the firm, it would merely mean this : that if they had been called upon at the time immediately to satisfy liabilities to that extent, they probably would have been unable to meet their engagements. But there is nothing to shew that the company, continuing to carry on the business, might not, in the course of time, have liquidated that deficiency. Notwithstanding this state of things the partners did go on ; they did carry on their business, and, as far as we can perceive, they carried it on with undiminished credit and reputation down to the year 1865. In that year, the month of June, 1865, a scheme was suggested for forming a joint stock company, which company, when established, was to purchase the business of *Overend, Gurney, & Co.* The company was formed on the 12th of July, 1865, by means of a memorandum and articles of association, which were duly registered according to the Act of Parliament.

Now at that time (and this is a very important circumstance) the state of affairs of the firm of *Overend, Gurney, & Co.* was fully known to all the parties who engaged in forming this joint stock company. There is a statement in the bill, which was not necessary, for the purpose of shewing that the partners of the firm knew perfectly well the state of their affairs ; but by the 7th paragraph in the bill it appears that all persons who joined in the scheme, and who were not partners, were fully acquainted with the whole extent of the business and the condition of the business at that time. The 7th paragraph, describing what was arranged before the company was formed, says that it was arranged that certain accounts, amounting in the whole to upwards of four millions, and which in a great measure were regarded as bad investments or doubtful debts, should not be

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taken over by the proposed limited company, and should not be transferred into the books of the company; but a credit was to be opened in the books of the company, and the partners in *Overend, Gurney, & Co.* were to be debited with this sum of four millions, and they were to be credited with certain other sums; which would have the effect of making them debtors to the limited company only in respect of the sum of £2,910,181. Then it was arranged that the sums which might be recovered out of these outstanding debts should be applied in liquidation of this sum of £2,910,181. Therefore, the circumstances of the partners were fully known to all the persons who agreed to form this company.

Then, on looking to the memorandum of association we shall see what was the object for which that company was formed. It is there stated that the objects for which the company is established are, amongst other things, "generally the carrying on the business of bill-brokers and money-dealers as heretofore carried on by Messrs. *Overend, Gurney, & Co.*, and with a view to the above objects the acquisition of such business upon terms to be agreed upon by the directors." Then in the articles of association, "the directors are authorized to purchase or acquire upon such terms and under such stipulations as to guarantee, or otherwise, as may be agreed upon, the business and goodwill of the said Messrs. *Overend, Gurney, & Co.* as the same now stands, and any other business of a like character which they may hereafter think it expedient to acquire for the benefit of the company."

I have no doubt whatever that the words "as the same now stands" must mean that the business is to be taken over with all its credits and liabilities, that is, as the business appeared in the books of the company. Accordingly, the Respondents, with the exception of Mr. *Samuel Gurney Buxton*, are appointed by the articles of association to be the directors with Mr. *Gibb*, the testator. All those persons, including Mr. *Buxton*, subscribed the memorandum of association and thereby became the company, and the only company at the time that prospectus was issued to which allusion has been frequently made, and which I shall have occasion to refer to presently.

The directors being thus empowered to purchase the business—to do that for which the company was incorporated—proceeded by

the deed of the 27th of July, 1865, to carry out the arrangement which was originally made—they did that which they were authorized to do. It is not alleged that they were at all fraudulent in their conduct, or that there was any breach of duty, or that there was any negligence. But having done this act they are now to be charged with an enormous liability, to answer for all the losses which have been occasioned by the failure of the company in consequence of its being a most imprudent and improper act to purchase this business of *Overend, Gurney, & Co.*

My Lords, as it appears to me, the complaint or objection which ought to have been made goes still deeper than the carrying out of this purchase—it ought to have been to the formation of the company itself for the purpose of purchasing a concern which was a very hazardous one, and according to appearances, upon the face of the business certainly, was full of hazard and danger. But, however, that is not the charge in the bill. The bill states facts from which we are asked to draw the inference that there was negligence or misconduct on the part of the directors.

Now, my Lords, how is that made out according to the argument on the part of the Appellant? It is said that there was some discovery made by the directors before the execution of the deed of the 27th of July, 1865, by which they acquired a knowledge of the circumstances of the firm of *Overend, Gurney, & Co.* which should have induced them to decline the purchase, or at least to call a meeting of the shareholders to say whether they should carry out the intention for which the company was incorporated. I have already shewn your Lordships that there was no discovery whatever made at any time between the original arrangement and the execution of the deed of July, 1865. I have shewn your Lordships that from the very first, from the time the arrangement was entered into, all parties knew perfectly well what was the state of the affairs of *Overend, Gurney, & Co.*, and that therefore there can be no ground whatever for saying that anything occurred between that arrangement and the execution of the deed which should have made the trustees doubt and hesitate whether they ought to execute the authority which was entrusted to them.

My Lords, with regard to that deed of July, 1865, that was no

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doubt prepared originally—certainly at the time the prospectus was issued—because the public are informed by that prospectus that the deed of covenant (which of course must mean the draft deed of covenant) might be seen at the office of the solicitors of the company. I do not quite agree with Mr. *Cotton's* view that the arrangement having been made, the arrangement was completed by the execution of that deed of the 27th of July, 1865. What was the arrangement? The arrangement was that a company was to be formed which should purchase the business of *Overend, Gurney, & Co.* Then the completion of that arrangement was the formation of the company, the incorporation of the company, and the power given to the directors by the memorandum of association and the articles of association to purchase this business. That completed all that the arrangement required. It invested the directors with the powers which were necessary for the purpose of enabling them to carry out the objects for which the company was incorporated.

Accordingly, that deed was executed. Now what is the ground upon which any *crassa negligentia* can be charged upon the directors, not for having executed that deed, but for carrying out the arrangement at all? There is no statement whatever that the business in fact was not worth the sum, the half million, which was given for it. Undoubtedly, as my noble and learned friend has said, the speculation was a hazardous one. I was rather surprised to hear it denied that the business of a bill broker was hazardous, but there can be no doubt whatever that it was a speculation which might answer or might not; but at all events it was one which the trustees were authorized to carry out by means of the purchase of the business. Now there is no allegation whatever that the business was of such a ruinous description (because that word has been used) that it was a most imprudent and improper act on the part of the trustees to go on with the arrangement. My Lords, it does not at all follow, because the business of *Overend, Gurney, & Co.*, presented a rather formidable aspect, that with the addition of five millions of capital, which was the capital of the company that was established, and by carrying on the business prudently and carefully, it might not have become a very flourishing concern.

There is another ground upon which it was said that the trustees

acted improperly and negligently, and that was with regard to the guarantie which was taken from the partners in the firm of *Overend, Gurney, & Co.* There is nothing to shew that the directors were aware, or even could be aware, that the partners' income and property were not quite sufficient to secure the company against any losses which could have been incurred. But the guarantie was part of the original arrangement which the directors made; and it seemed to be, in the course of the argument, suggested that the directors first of all took a guarantie which would have provided for the immediate satisfaction of the different liabilities which they incurred by undertaking the business, and that afterwards they agreed by this deed to postpone the time. There is nothing of that kind shewn on the bill; there is no such fact stated; and all that appears is that they took this guarantie, postponing the time in which it was to be available; and at the same time there is nothing to shew that they did not get the very best terms which they could possibly get from the partners in the original firm.

Then, my Lords, something has been said with regard to the prospectus. I confess, according to my view—I may be wrong—but I thought that that prospectus has nothing whatever to do with the question here. If it had been a question between the directors and a shareholder, and the shareholder had alleged that there had been any misrepresentation in that prospectus, of course it would be a ground for relieving him from his being a shareholder at all. But even supposing that that prospectus contained any misrepresentations (there is no proof that it did so) it seems to me not to have any bearing upon this question, which depends, according to my view of it, entirely upon the powers which were given to the directors and the mode in which those powers were executed. Now by the memorandum of association stating the objects of the company, the powers given to the directors were “to purchase or acquire upon such terms and under such stipulations as to guarantie, or otherwise, as may be agreed upon, the business and goodwill of *Overend, Gurney, & Co.* as the same now stands.” They did that. They did it, it is admitted, honestly and fairly, and believing that they were doing it in the discharge of their duty, and it seems to me to be a very strong and unusual thing for a suit to be now instituted to make the directors liable

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for the loss which has occurred under these circumstances. In fact, it amounts to this: an agent, (because these directors are really more in the character of agents than of trustees, they are mandatories,) an agent being authorized to do an act, which act is in itself an imprudent one, and which the principal ought never to have authorized to be done, is when the loss is occasioned by his having done the act, to be made liable for it. That certainly is rather a startling proposition, and one which it would require a great deal of argument to lead me to adopt. Under all the circumstances, I think it is perfectly clear that the decree of my noble and learned friend ought to be affirmed.

LORD WESTBURY:—

My Lords, this is a bill filed by that abstract ideal legal existence called “the company,” against the officers of the company, to make them answerable for a misuse of their powers. Now this suit has been referred to as being of rather a singular character, but one of its curiosities has not been noticed. From this bill you are unable to gather that there ever were any other members of this company than those who were concerned in the genesis thereof. There is, in truth, an allegation in the bill—which cannot be accepted as containing, by implication, the statement that there was another body of persons—I mean the allegation in the 14th paragraph, in which it is stated that the directors did something without any communication with the shareholders of this Plaintiff company. But whether there were any shareholders, except the directors themselves, you look through the bill with a vain endeavour to ascertain. Now the company, in a legal sense, comes into the world upon the registration of the memorandum and the articles of association; and the general character of the suit, putting aside what I have said, may be thus described. The company says, you, our officers, our directors, receive from these articles of association certain powers, and you have made a gross misuse of those powers, most imprudent and most ruinous; and by reason of this neglect on your part, this abandonment of all the rules of prudence, the capital of the company has been wasted in the acquisition of what has been an insolvent and a ruinous speculation. The theory, therefore, of the bill is this, that the company

gave to the directors these powers believing that they were to use them in the acquisition of a solid, well-established, thriving concern; and that the company knew nothing of the state of the concern, but left that to the directors to ascertain, and that the directors concluded the purchase and applied the purchase-money, having ascertained that the thing was a dead loss, and therefore misused their powers. In that view of the character of the bill, independently of the argument which has been founded upon the extent of the powers given in the articles of association, and the argument that those powers warranted the use that was made of them, I wish particularly to draw your Lordships' attention to that which I vainly endeavoured from time to time to impress upon the counsel at the Bar, namely, that the bill contains the clearest admission that the company, before the purchase was completed, knew perfectly the insolvent character of the concern which the company was in point of fact embodied [to acquire, which the directors undertook the duty and office of acquiring, and which they were empowered to do by the persons now complaining of them for using the powers given to them for the purpose. It would be preposterous to hold that a company, or any other creature, can complain of a thing being done the nature of which was previously well known, and was fully authorized. The object of the purchase was well known to these persons before the purchase was made, and known to them, in fact, at the very time when they created powers and authorities for the purpose of doing that which was afterwards done.

I have said that the company came into existence upon the registration of the memorandum and articles of association; but the memorandum and the articles of association were created for the very purpose of acquiring this business; and when they were created, when the company was begotten (if I may so use the phrase) it was by persons who were perfectly well aware of all that existed at the time, and of all that was subsequently found to be in existence; and they created this company for the purpose of doing the very thing which was done. The vice that has occurred was in the very creation of the company, the evil that is complained of was the very thing for the purpose of accomplishing which the company was created and called into existence. Or if you do not

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put it so high, yet the thing that was done was done under powers given by the company with a perfect knowledge of the real state of that subject matter of property which the powers given to the directors were to be used for the purpose of acquiring.

The company coming into existence on the registration of the memorandum of association, the bill tells us, without any word of complaint, that immediately after the registration, that is immediately after the formation of the company, which formation includes the appointment of the directors, a prospectus which had been prepared by the intended directors with the privity and assistance of other parties, was issued by the intended directors for the purpose of establishing the company. That was to be the very basis on which the company was to be built. It was an announcement by the company to the world, through the medium of the only persons by whom the company could act, and by whom it is represented as acting, in this manner without one word of complaint, that the company was formed and intended to be used as the means of acquiring this business, and taking it over with all its assets and with all its liabilities. And in so doing these persons did not take a leap in the dark, because at the end of the prospectus they tell the world (and what they tell the world they must have known themselves) that a copy of the memorandum and the articles of association (instruments of their own creation) as well as of the deed of covenant in relation to the transfer of the business, can be inspected by the world at the offices of the company. Is it too much, then, to attribute to the company a personal legal knowledge of that which they, who formed the company, tell the world may be acquired at their offices? Undoubtedly it is not. You must attribute to them, from the first, a knowledge of the state of this business, and a deliberate intention to acquire the business through the medium of the formation of the company, notwithstanding what was apparent to everybody, on the inspection of that deed of covenant, that the acquisition of the business would be attended with the incurring of an enormous amount of debt, and also with the acquisition of a large amount of assets, of a most perilous and hazardous description, to meet that debt.

Now, my Lords, we go a little farther. There was a subordinate portion of this complaint, and I will put it in the abstract, and

as clearly as I can. It consisted of this: In carrying out this purchase, say these complainants, you did not, in point of fact, adhere to the general condition of your authority that you were to take over all the assets and all the liabilities; for you left a great portion of the assets in the hands of the partners of the old firm, with power to collect them, and thereby diminished your security in the transfer of the business to yourselves. Now that is hardly made, as it ought to have been made, the subject of distinct complaint, and in the words in which I have clothed it I have given it a much greater distinctness, I conceive, than anything that can be found in this bill. But the answer to it is obvious; supposing you have no right of complaint, which I assume you have not from the observations I have already made, this subordinate part of the complaint must first be dealt with, rejecting the main complaint, which is a complaint of the acquisition of the business at all. But now, if it is admitted that the directors had the power to acquire the business, then we come to the contingent powers that were given to them by the articles of association, and those are, clearly, that they were to acquire the business "upon such terms and under such stipulations, as to guarantie or otherwise, as may be agreed upon." Now this subordinate point of the complaint clearly comes within those words; because, although the assets are left to a certain extent under the control of the old partners, it is with the accompaniment of a variety of stipulations, securing to the new company the real benefit of the transaction, and superadding this condition, that there shall be an absolute guarantie binding the personal estate of the old partners to the extent of the whole amount of the liabilities *plus* the assets that shall be realized. It is impossible to make that a subject of complaint, unless the original transaction itself admits of being set aside.

But now, again, comes another head of complaint, which really can hardly be seriously dealt with. Say the objectors to the decree of the Lord Chancellor, "Why, it might have been within your power to do all this, but when you found the insolvent state of the concern—that is, when you found that which we, the company, the complainers against you, previously well knew—you ought not to have carried this contract into effect without coming back

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to us, the company, who had plainly told you that we knew the whole, and yet sent you forth with authority to complete the transaction."

Then comes a ludicrous suggestion: You should have called a public meeting of the shareholders—there being no allegation in the bill that there were any—and you should have submitted to those shareholders the condition of things and asked the shareholders to tell you whether you were to go on, or whether they would give you supplementary powers to complete that which you had been previously directed to do. But, my Lords, if the first part of the case is right, namely, that they were told to acquire this business, and told to acquire it notwithstanding all that appeared upon that deed of covenant, the recurrence to a public meeting, which in reality could do nothing to alter the original constitution, intent, and object of the company, is a mere ludicrous thing.

I must just advert only to another thing, which gives one the greater satisfaction in dismissing this bill, and it is this: that throughout the bill, from the beginning to the end, we are left without the smallest information upon that point which is the cardinal point in the whole case, namely, the value of the business. It is of no use to tell me that the liabilities of the business were two millions, while the annual profits of the business might have been themselves nearly a million a year. And when you talk of the liabilities, and of the price to be paid for the business as a ruinous price, you must first tell me, before I can agree with you as to the ruinous character of the speculation, what was the nature of the business itself, and what, if it had been well managed and confined to its original purpose, might have been for the future, after the time when this company was formed, the legitimate amount of the profits resulting from that business.

My Lords, I cannot therefore abstain from expressing my satisfaction at finding that the view taken by the Vice-Chancellor was not a view warranted by a real knowledge of the facts of this case, and that his decision was properly reversed by the Lord Chancellor; and I hope that your Lordships will confirm the decree of the Lord Chancellor, and dismiss this appeal with costs.

LORD COLONSAY:—

My Lords, I have had no difficulty in arriving at the same conclusion. It appears to me that, assuming the facts set forth in this bill to be the real and actual facts of the case, they do not, by any fair and reasonable inference that can be drawn from them, support the conclusion that was aimed at, that is to say, the prayer of this bill. And, for the reasons which have been stated by my noble and learned friends who have preceded me, I agree in the opinion that this appeal should be dismissed with costs. I think it unnecessary to repeat those reasons, which are quite satisfactory to my mind.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 12th April, 1872.

Solicitors for the Appellant Company: *Maynard & Son.*

Solicitors for the Respondents: *Upton, Johnson, Upton, & Budd.*

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WILLIAM WOTHERSPOON AND ANOTHER APPELLANTS;
AND
JOHN CURRIE RESPONDENT.

Trade name—Injunction.

In order to constitute a ground for interference by a Court of Equity to protect a manufacturer against the use, by another person, of the particular name of his manufactured article, it is not necessary that there should be a *mala mens* towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled through this unwarranted designation to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured.

Where a trade mark is not actually copied, the existence of a fraudulent intention is a necessary element in the consideration of a case of this description. The party complained of must be proved to have done the act with the fraudulent design of passing off his own goods as those of the Plaintiff. It is not necessary, however, to shew an exact resemblance between the original and the counterfeit—it is sufficient if there is such a resemblance as will mislead an unwary purchaser.

A name may become a trade denomination, and as such the property of a particular person who first gives it to a particular article of manufacture. The employment of the name by another person for the purpose of describing an imitation of that article, is an invasion of the right of the original manufacturer, who is entitled to protection by injunction.

IN this case a bill had been filed to restrain *Currie* from using the name “*Glenfield*” in connection with starch manufactured by him, such name being claimed by the Appellants as exclusively belonging to the starch manufactured by themselves.

Messrs. *J. & W. Fulton & Co.*, had formerly carried on the business of starch makers at *Glenfield*, near *Paisley*. They manufactured a species of powder starch from sago, and gave it the name of “*Glenfield Double Refined Powder Starch*,” by which name it became well known to the public. In 1847, the Appellants purchased the business from them, and with the business the plant and stock at *Glenfield*. One of the clauses in the agreement of purchase was contained in a letter from *W. Fulton* to *W. Wotherspoon*, which was in these words: “That you have the sole right

of using the words ‘*Glenfield Double Refined Powder Starch*,’ and that I will retire from the business of starch-making entirely.” For some years the Appellants carried on the business of making starch at *Glenfield* itself, but that business increasing very considerably, they removed the works to another and more commodious place, also situated near *Paisley*, called *Maxwelltown*, where they had larger premises, which became known as the “*Glenfield Starch Works*.” The article itself was commonly known as “*Glenfield Starch*.”

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The Respondent *Currie* was a starch and corn flour manufacturer, carrying on his works at *Paisley*; his place of residence had been for many years at *Glenfield*, during the whole of the time that the starch works of *Fulton*, and afterwards of the Appellants, had been carried on there. In 1868, there was some arrangement between the younger *Fulton*, the son of the former proprietor, and *Currie*, by which *Currie* obtained possession of a small part of *Fulton*’s premises at *Glenfield*, and began making starch there. In 1869, the Appellants discovered that starch manufactured by the Respondent had been sold by him as manufactured by “*Currie & Co.*,” but with the words “*Glenfield Starch*” printed on the sale labels. They accordingly took proceedings against him in the Court of Session, and obtained an interdict prohibiting him from using the description “*Glenfield Starch*” affixed to any packets of starch sold by him in *Scotland*. They afterwards found that starch manufactured by the Respondent was sold by him under that special description in *England*, and they filed a bill in Chancery against him to restrain him from so describing his manufacture. In the affidavit of the Respondent, filed in answer, he stated that he had resided in *Glenfield* for the last twenty-four years; that that fact, and the excellence of the water there for the manufacture of starch, and the cheapness of labour there, had induced him to set up his manufactory in that place. *Glenfield* was in fact an open place, with some cottages, not enough to constitute even a village, and with a factory where this business was carried on, and it was admitted that the water there was excellently suited for the purpose. The starch appeared to have been put up in packets somewhat resembling those of the Appellants; but the ground of

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complaint in the bill was as to the labels; the material parts alleged as in violation of the Appellants' rights were these:—

The Appellants' labels were in this form:—

"GLENFIELD
PATENT DOUBLE-REFINED POWDER
STARCH,
 EXCLUSIVELY USED IN THE ROYAL LAUNDRY,
 AWARDED THE PRIZE MEDAL, 1862.

Manufactured by ROBERT WOTHERSPOON & Co., Great Wellington Street,
 Kinning Park, (and 70, Union Street,) Glasgow.
 London Depot—WOTHERSPOON & Co., 66, Queen Street, City."

The Respondent's labels were in this form:—

"THE ROYAL PALACE
DOUBLE REFINED
PATENT POWDER STARCH.

CURRIE & CO.,
 STARCH AND CORN FLOUR MANUFACTURERS,
GLENFIELD."

A great many affidavits were filed on both sides, and, among other things, it was proved that the Defendant's starch was sold to wholesale dealers at a somewhat less price than was paid for that of the Plaintiffs.

The motion for an injunction came on before Vice-Chancellor *Malins*, who, on the 25th of February, 1870, made the order as prayed. On appeal, Lord Justice *James*, upon the 5th of July, 1870, discharged the order for an injunction. The motion for a decree then came on to be heard before Vice-Chancellor *Malins*, who acting, as he conceived himself bound to do, on the authority of Lord Justice *James*' decision in the matter of law, dismissed the Plaintiffs' bill; but, adhering to his own opinion on the facts, dismissed it without costs. This appeal was then brought.

Sir *R. Palmer*, Q.C., and Mr. *Fischer*, for the Appellants:—

The principles which have governed the decision of the Court of Session in this case ought to have governed that of the Court of

Chancery. The particular name of "*Glenfield*" which distinguishes this from all other kinds of starch, has been wrongfully usurped by the Respondent. That name is, in fact, the trade-mark of the Appellants' business, and cannot be adopted and used as such by another person without an infringement of their rights.

[*Edelsten v. Vick* (1), *Croft v. Day* (2), *Morison v. Moat* (3), *Shrimpton v. Laight* (4), *Edelsten v. Edelsten* (5), *The Leather Cloth Company v. The American Cloth Company* (6), *Millington v. Fox* (7), *Perry v. Truefitt* (8), and *Rodgers v. Nowill* (9) were cited.]

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Mr. Cotton, Q.C., and Mr. Freeling, for the Respondent:—

The name of *Glenfield* is that of the place where the Respondent actually resides, and where he has resided for many years. There can be nothing wrong in his using the name of his own residence, and which is, as it is in this case, the place where the starch is actually made. By attempting to appropriate the name of the place where the Appellants formerly made the starch, but where they no longer make it, they cannot exclude all other persons, especially those who reside in the place and carry on their manufacture there, from employing it. The Appellants' starch is, in fact, no longer *Glenfield* starch; it is not made at that place, and it has lost the benefit of the peculiarity of the water there, which is asserted and admitted to be of a quality valuable for manufacturing it. The cases cited do not apply. In all of them there was a colourable imitation of the article manufactured—here there is none. There is no misrepresentation, nor any fraud, and the name on the Respondent's label is not in any manner connected with the description of the starch manufactured by him, and, used as it is on these labels, cannot mislead any one. The Court will not, without the pretence of either colourable imitation in the article, or fraudulent misrepresentation, whether as to the place of its manufacture or anything else, deprive a manufacturer of the use of the

- (1) 11 Hare, 78-85.
- (2) 7 Beav. 84.
- (3) 9 Hare, 241.
- (4) 18 Beav. 164.

- (5) 1 De G. J. & S. 185.
- (6) 11 H. L. C. 523.
- (7) 3 My. & Cr. 338.
- (8) 6 Beav. 66.

- (9) 6 Hare, 325.

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name of the place where he actually resides and makes the article which he sells.

At the conclusion of the Respondent's case,

THE LORD CHANCELLOR (Lord *Hatherley*), after stating the nature of the case, said :—

I think the principles governing these cases have been so well settled by a long series of decisions that the only difficulty which exists in a case of this kind is to apply those principles to the particular facts before us. I think the authorities entirely bear out the case of the Appellants as one entitling them to a remedy, when the facts are understood. There are certain facts which are quite beyond dispute, but I will not enter upon a large mass of evidence which must all be fresh in your Lordships' minds. I think the selection of one or two points will be quite sufficient to shew upon what principles, as far as I express my opinion in this matter, the conclusion has been come to.

The Respondent having a brother in this business, and finding that there was a considerable sale of starch under the name of "*Glenfield Starch*," conceived the idea of becoming himself a starch manufacturer, and applied to Mr. *Fulton* to let him occupy a small portion of a building at *Glenfield* which Mr. *Fulton* was employing in another business of his own, and which so occupied is part or the whole of the building where the original manufacture of *Glenfield* starch was carried on. Some time before this the Appellants had removed their works from *Glenfield* to *Maxwelltown*, *Paisley*, in the neighbourhood of which latter place *Glenfield* is situated. Having conceived that idea, the Respondent set up his manufactory at *Glenfield*. Now what is *Glenfield*? *Glenfield* is not a town like *Burton-upon-Trent*, from which ale is named, and in which there are many manufacturers of the so-called "*Burton Ale*." Nor is it a place which has any special circumstances connected with it (although something was attempted to be said about the water used in the manufacture) which would make the starch manufactured there particularly good. But it simply happened that this starch was manufactured at the place called *Glenfield*, which is really only a place of about sixty inhabitants. It is not a parish, it is not a hamlet, it is not a district of any special

character, but it was an estate of that name upon which some people seem to have erected some houses or manufactories, and upon which now some sixty people are living. There was, therefore, nothing whatever to give particular celebrity to the name of *Glenfield* so connected with a starch manufactory, beyond the fact that the Appellants had manufactured an article known by that name, and having a very large sale under that name.

That, of course, was a fact of considerable importance and value to anybody who should be minded to appropriate the name of "*Glenfield*" to his starch.

That being so, the Respondent prepares his labels for his starch, and upon those labels he takes the course of not calling it "*Glenfield Starch*" *eo nomine*, but he puts a view of a palace, either *Holyrood* or *Balmoral*, as the case may be, upon the top of his packets, instead of a picture of the manufactory which was placed upon the top of the Appellants' packets, and he puts the name of *Currie*. He does not put the name of Mr. *Wotherspoon*, and does not call it "*Glenfield Starch*," but he calls it "*Royal Palace Starch*," and he puts "*Royal Palace*" on the top of the article—then down at the bottom you see the name of "*Currie*." But on either larger or darker letters, as the case may be—sometimes larger and sometimes darker than any other word upon the packet—and as the last word of the whole, you see written in very distinguishing and very "emphasised" characters, as one of your Lordships has called it, the word "*Glenfield*." In that state of preparation he sends out his goods.

Nothing is relied upon by the Appellants (and very properly) with respect to the shape or form of the packets, because it appears that all starch manufacturers are in the habit of making their packets in much the same shape and form. The wrapper is of a light blue paper with a green label on the outside of it describing the article and giving directions for its use. In every respect the packets sent out by all starch manufacturers would be like those sent out by the Appellants and the Respondent, with one or two exceptions. There would be upon each person's packet the name of the manufacturer, and if he has given his article a name, as the Appellants had given their starch the name of "*Glenfield Starch*," there would be the name, for example "*Glenfield Starch*." The Respondent in the same way puts his name "*Currie*," and also the name

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of the starch, "*Royal Palace Starch*," and these things appear upon the packet. These, no doubt, are the two material things—the name of the manufacturer, and, if the article has a name of its own, the designated name of the article.

But there is one remark that I have had occasion to make upon very many opportunities which have occurred to me whilst I have been on the bench with regard to this circumstance of the likeness of packets of goods made up by different manufacturers in a particular trade. The same thing occurred in a case that I had before me with respect to packets of needles. You may see packets of needles done up in much the same way as those packets of starch were, that is to say, in dark blue paper with a green label, as for that peculiar article of trade. I took occasion to remark in that case, and that is the only remark to be made upon what the Respondent has done in this case, that when there is so much general similarity, it does become the more necessary to take care that the mark which is to distinguish the article shall be really distinguishing, and that when you have got all the other combinations, so that persons do not look at the shape of the packet, or at any other *indicia* of the packet than the particular distinguishing mark (in this case the name of the man, or the fancy name of the article), those things should, by people who wish to deal honestly by each other, be kept very distinct. Therefore the name "*Currie*" ought to be distinct, as I believe it is, and the name of the article again, if it has acquired a name, should not, by any honest manufacturer, be put upon his goods if a previous manufacturer has, by applying it to his goods, acquired the sole use of the name. I mean the use in this sense, that his goods have acquired by that description a name in the market, so that whenever that designation is used he is understood to be the maker, where people know who the maker is at all—or if people have been pleased with an article, it should be recognised at once by the designation of the article, although the customers may not know the name of the manufacturer. It may very well be that hundreds of people like *Glenfield Starch*, and order it because they think that it is the best starch that they ever used, without having heard the name of Mr. *Wotherspoon*, and without knowing him at all. They say, I want the thing that bears that name, the thing made in a particular way, made by the manufac-

turer who makes it in that way, and there being only one manufacturer who does make it in that way, I want the article made by that manufacturer.

That being so, it appears to me that the Respondent, if he was an honest manufacturer setting up in business, would take great care, and all the more because he was setting up in business in a place where *Glenfield Starch* had been manufactured and sold, to disconnect his name with any name which had become exclusively a designation of an article manufactured by the Appellants. There is a passage in the Respondent's answer in which he says: "There is no reason in the world why I should take the name, because I manufacture something superior, and at a cheaper price, therefore why should I take the name of the Plaintiffs?" Well, then, one naturally asks, why should he do anything to lead people to suppose that his name is to be in any way associated with *Glenfield*, or this inferior article (as he says) with his. It must be damaging to him that his "*Royal Palace Starch*" should ever be called "*Glenfield Starch*." If this statement of his be true he would desire above all things to dissociate himself from a name by which an inferior article could be palmed off as his; but, on the contrary, there is not a tittle of evidence of his ever having advertised his article as "*Royal Palace Starch*," alone or gone about selling it merely as "*Royal Palace Starch*."

But we have this farther evidence, which is of the greatest importance, and which I pointed out during the argument. One witness, to my mind, is as good as twenty or thirty for this purpose; there were several others of a similar character, but none whose evidence so strongly pressed on my mind as that which I am about to mention. I refer to the evidence of a witness of the name of *Bentley*—not an unfriendly witness, for he made an affidavit both for the Appellants and for the Respondent. What Mr. *Bentley* tells you plainly and distinctly is this: Mr. *Fisher*, who is the agent of the Respondent—what we should call his traveller going round selling his goods—comes to me and asks me to buy some "*Glenfield Starch*." Now in so doing he was doing that which was extremely wrong, although it is true that *Bentley* would know that *Fisher* was acting for *Currie* and not acting for *Wotherspoon*. But it struck *Bentley* as wrong, and accordingly he said: "I had some

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conversation with him about his using that term '*Glenfield*,' and I asked him about it, and I had some conversation about the exclusive use of the name, in which he said: 'The Plaintiffs are not entitled to use it exclusively, as they had left the original place of manufacture, and that Defendant's was the true '*Glenfield Starch*.'"

Then the Respondent called Mr. *Bentley* as a witness for him to explain his evidence with reference to Mr. *Fisher*'s, and Mr. *Bentley* says: "I did not intend to convey an idea that Mr. *Fisher* had endeavoured to induce me to purchase the Defendant's starch as the starch of the Plaintiffs. There was no attempt by Mr. *Fisher* to sell his goods under any false impression." But that is not the strength of his former evidence. He does not deny or retract a single word that he said in his original affidavit, but all he says the second time is: "He did not give me the impression, nor did I think that he intended to give me the impression, that the Defendant was manufacturing the Plaintiffs' goods." Of course not to Mr. *Bentley*. *Bentley* knew them both. Mr. *Bentley*'s question to him was: "How came you to use the name which has been used by Mr. *Wotherspoon* hitherto?" Mr. *Fisher* himself in his affidavit tries to get out of these words altogether, and tries to throw them upon Mr. *Bentley* himself as having made the observation, "Yours are the original works." He says, I did not say "Ours are the original works," but Mr. *Bentley* said facetiously, "Yours are the original works." Mr. *Bentley* says in his explaining affidavit that he said nothing of the sort, and he does not retract anything that he said before.

It seems to me, therefore, to come to this, that you have distinct evidence that when the word "*Glenfield*" is put upon the label it has been put there with an object, and that that object has been carried into effect by the Respondent's agent. Now what was the Respondent's intent in putting "*Glenfield*" in a conspicuous place without there being any necessity whatever for putting it there? It is admitted that *Glenfield* is not a post town, nor a postal district, or anything of the kind. Why was the word "*Glenfield*" placed in a conspicuous position on the label without any necessity? In order that Mr. *Fisher* may go round and say, "There is my *Glenfield Starch*; will you buy it? Ours is the original *Glenfield Starch*; will you buy it?" It is as plain and

manifest as anything can possibly be that "*Glenfield*" is put there for that express purpose, there being no other possible reason, as I said before, why it should be put there.

There was a faint attempt, which only makes the case worse, to shew that it was necessary to put "*Glenfield*" on the labels because the business address of the manufacturer was there, the truth being that his business address was not there; that address was at No. 14, *High Street, Paisley*. In the directory Mr. *Currie's* private address when he is at home is given as *Glenfield*, and his counting-house, his place of business, the place to which his orders ought to be directed, is not in *Glenfield*, it is at *Paisley*. Therefore, there being everything else which might be calculated in the case of an unwary customer to shew that these goods are like every other starch goods, they being wrapped up in the particular covers which are ordinarily used in the starch business, and he saying, "All I want to look at is what is the name of it," when he looks down at the bottom and sees in large letters "*Glenfield*," he says, "That is the thing; *Glenfield Starch* is the thing I am looking for. I do not remember the name of Mr. *Wotherspoon* or of Mr. *Currie*; I do not care about the name of any particular person, but I want *Glenfield Starch*." Therefore it is in fact admitted that the designation "*Glenfield Starch*" is appropriated, and it seems to me that the case is at an end when once it has been shewn that a man going round and selling this starch gives it that name and asks people to buy it by that name.

But the case does not rest there, because there is abundant evidence that when *Glenfield Starch* is asked for in retail shops the Respondent's goods are sold as *Glenfield Starch*, which is the designation and characteristic of the Appellants' goods. It has been long ago pointed out in decided cases that it is not upon a *mala mens* towards the first purchaser that the decision of these cases rests. The first purchaser buys the goods cheaper for the very purpose of being able to sell them as *Glenfield Starch*, the means of doing so being put in his hands by his being furnished with goods with this label—I will not say in order that he may deceive, but it is a necessary consequence that he is enabled to deceive others by this means. There is evidence that this is an article sold by retail at the same price as the Appellants' goods, although

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it is bought at a less price from the Respondent in order that it may be so sold. That is just the very case of all others in which the Court has constantly interfered to prevent that which is a distinct fraud.

My Lords, I think that authorities quite sufficient to support this case may be found, if it is necessary to refer to special authorities for any purpose whatever with respect to fraud, which you can hardly define. In the case of *Franks v. Weaver* (1), a very remarkable case, where a man had put his own name, but had taken care to introduce the name of "*Franks*" by way of shewing what a valuable invention it was that Mr. *Franks* had made. Though he put his own name as the actual manufacturer of the article, the Court saw through the device and said, "You want to get the name of Mr. *Franks* upon your label and you take this means of doing it—it is an ingenious means, no doubt—but we shall stop your so putting the name of Mr. *Franks* there because it operates as a deception." Accordingly, in this case, I apprehend that the Appellants ask only what they have a right to ask, namely, an injunction to prevent the use of the name of "*Glenfield*" upon the labels. Another of the authorities was a case which came before a noble and learned Lord on appeal, with respect to *Anatolia* liquorice, it was before Lord *Cranworth*. The offence consisted in putting upon the labels that which naturally led, and from evidence of suspicious conduct we are justified in saying was intended to lead, to the conclusion on the part of the public that whilst they buy the Respondent's goods they are buying an article manufactured by the Appellants, they do buy it in consequence of a name being used the celebrity of which was first acquired by the Appellants, and the value of which was first acquired by its being applied to the Appellants' manufacture, which of course they think it continues to be.

[His Lordship then referred to the prayer of the bill, certain words of which he proposed should be omitted from the order made upon granting it, and added:—] The Appellants do not wish an inquiry to be made as to the amount of damages. In fact, we here concur entirely with the view taken in *Scotland* upon the

(1) 10 Beav. 297.

same subject-matter. The same decree in effect has been granted in that country. I think, therefore, that the decision of your Lordships should be, that the order of the Lord Justice which has been complained of, and the decree of Vice-Chancellor *Malins*, in which he felt himself compelled to follow the Lord Justice, must be reversed, and that a proper decree should now be made, granting an injunction to the Appellants in the terms of the first paragraph of the prayer, altered in the manner I have suggested; and ordering that the Respondent should pay the costs of the suit, excluding of course the costs of the appeal.

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LORD CHELMSFORD:—

My Lords, I entirely agree with my noble and learned friend. When the principle is ascertained upon which the question of piracy of trade-marks is to be determined, each case must be considered, upon the facts, whether they do or do not bring it within that principle. Where the trade-mark is not actually copied, fraud is a necessary element in the consideration of every question of this description—that is, the party accused of piracy must be proved to have done the act complained of with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trade-mark. For the purpose of establishing a case of infringement it is not necessary to shew that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as, not only to shew an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs. Has the Respondent, then, been proved to have infringed the Appellants' trade-mark within the established principle?

The Appellants do not, as was suggested in argument, complain of the use of blue wrappers with great labels, although in their bill they mention, by way of narrative, the use by the Respondent of wrappers and labels of this description. It is quite clear that they were the ordinary wrappers and labels used by the trade generally. But what the Appellants ask for in their prayer is an injunction against using the word "*Glenfield*" in or upon any

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There were many circumstances to shew that the Respondent did that which gave his starch the character of being the starch manufactured by the Appellants, and that he did it *malò animo*; some of the circumstances may be a little minute, but they all tend to the same conclusion.

In the first place it may be asked why he selected the words "*Royal Palace Starch*," and put them prominently forward in his title. There cannot be the slightest doubt that it was because on the labels of the Appellants their starch was stated to be "exclusively used in the Royal Laundry." Then, again, why did he place the word "*Glenfield*" on his labels in such a manner as to be prominently distinguishable from any other thing upon the label? Either it was much larger than any of the other words, or else it was very dark, so as to be sure to catch the eye of an intending purchaser? The reason which is given for the use of the word "*Glenfield*" is that it was "a necessity." I think that is the expression—that it was only used by necessity as being *Currie's* address. Well, but why by necessity? It was not his place of business—his place of business was at 14, *High Street, Paisley*. There, as his traveller says, all the books were kept and all the correspondence was addressed. Therefore, here is a false explanation given of a fact which is very striking in itself, namely, the use of "*Glenfield*" in so prominent a way as certainly to lead everybody at the first sight of the label to believe that it related to *Glenfield Starch*.

Now there is distinct evidence that the Respondent's agent passed off the Respondent's starch as "*Glenfield Starch*." My noble and learned friend has alluded to one portion of the evidence, to which he called attention in the course of this argument, which I think is so very important, as shewing a distinct proof that there was this recommendation of the Respondent's starch as "*Glenfield Starch*" by his agent, that I will read it to your Lordships:—[His Lordship here read part of the affidavit of *Bentley*.] Then there is the evidence of Mr. *Dickie*, who says that "In or about the month of February, 1869, he called upon me as representing the Defendant, who trades as *Currie & Co.*, and offered the Defen-

dant's starch to me as '*Glenfield Starch*,' by which name, and not as '*Royal Palace*,' or by any other name, he described it. I asked him how he came to call it '*Glenfield Starch*,' and he replied that it was made at *Glenfield*. The reason that I asked the question was, that I believed the Plaintiffs were the only makers of '*Glenfield Starch*.'" It is quite unnecessary to refer to other cases in which there has been a similar passing off of the starch of the Respondent as "*Glenfield Starch*." These two instances are quite sufficient.

I am satisfied by the evidence that the Respondent's object in getting possession of a small piece of standing ground, I may call it, at *Glenfield*, was for the purpose of commencing operations by acquiring a right to mention *Glenfield* in his advertisements, and that he followed this up by trying how near he could come to a deceiving resemblance of the Appellants' labels, and be safe from a charge of piracy. By prominent mention of "*Glenfield*" in his labels, and by the representations of his agent, he succeeded in passing off his starch as "*Glenfield Starch*," and it appears by the evidence that he has succeeded in drawing off from the Appellants a great number of their customers.

It appears to me that this case closely resembles that of *Seixo v. Provezende* (1). Under all the circumstances I have not the slightest hesitation in agreeing with the conclusion at which my noble and learned friend has arrived.

LORD WESTBURY :—

My Lords, I have very few words to add, and they will rather be directed to a summary of the conclusions arrived at by my noble and learned friends than any addition to anything they have stated.

I take it to be clear, from the evidence, that, long antecedently to the operations of the Respondent, the word "*Glenfield*" had acquired a secondary signification or meaning in connection with a particular manufacture—in short, it had become the trade denomination of the starch made by the Appellants. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which I have

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(1) Law Rep. 1 Ch. Ap. 192. 12 Jan. H.L. 215.

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referred. The word "*Glenfield*," therefore, as a denomination of starch, had become the property of the Appellants. It was their right and title in connection with the starch.

Now the question is, has that property been invaded by the Respondent? I take the whole proceedings of the Respondent from the beginning to the end to be nothing in the world more than a contrivance for the purpose of getting the word "*Glenfield*" associated with his manufacture. If that be true, what the Respondent has done has been done *malo animo*, with the view of possessing himself of the denomination which was the property of the Appellant. That is apparent upon the face of his label, and it is more apparent by the delusive account which he gives in order to assign to the label some reason independent of the true reason, namely, that he wanted to get in the word "*Glenfield*" in connection with his manufacture. The real object and design of the Respondent are not only proved by the *evidentia rei*, namely, the labels themselves, but they are also proved by the use which the Respondent has made of the word "*Glenfield*" in connection with his manufacture. It is clear, from the whole of the evidence, that his agents have represented his starch as the "*Glenfield Starch*," and that he has got an increased currency and demand for his manufacture by the unlawful use of that particular word. I have no doubt, therefore, that this case comes within the principle on which the jurisdiction is founded—the principle being to prevent a party from fraudulently availing himself of the trade-mark of another which has already obtained currency and value in the market, by whatever means he may devise for the purpose, provided the means are devised in order to give him a colourable title to the use of the word, and provided it be shewn from the manner in which he has employed those means that his object was from the beginning to invade the property of the Appellants. That is clearly demonstrated in the present case to my mind.

I have therefore no difficulty in joining in the resolution of the House to overrule the order of Lord Justice *James*, to reverse the decree of the Vice-Chancellor, which was merely in obedience to that order, and to make a decree for the Appellants which, I apprehend, must be worded in some such form as this—namely, after the reversal of the decree and the order on which it was founded,

to go on to say that, the Appellants, by their counsel at the Bar, waiving the account and the claim for damages contained in the second and third paragraphs of the prayer, the Court decrees a perpetual injunction to be issued from using the said word "*Glenfield*," leaving out the words "applying the word '*Glenfield*' to or in connection with starch manufactured by or for him," which I suppose would be a difficult thing to do, but embodying in the decree the rest of the words contained in the first paragraph of the prayer, and also giving to the Appellants the costs of the suit.

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Order and Decree appealed from reversed. Injunction granted restraining the Respondent, his servants and agents, from using the word "*Glenfield*" in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be "*Glenfield Starch*," and from selling or causing the same to be sold as "*Glenfield Starch*," and from doing any act or thing to induce the belief that starch manufactured by or for him, the Respondent, is "*Glenfield Starch*" or starch manufactured by the Appellants; the Respondent to pay the costs of the Appellants in the Court below.

Lords' Journals, 18th April, 1872.

Solicitors for the Appellants: *Willoughby & Cox*.

Solicitors for the Respondent: *Roberts & Simpson*.

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April 22.

THE ATTORNEY-GENERAL APPELLANT;
 AND
 ARTHUR EDWARD CAMPBELL AND OTHERS RESPONDENTS.

Succession Duty—Foreign Domicile—Residuary Estate.

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 -5, 6, 8, 10, 12,
 13, 15,
 7 Ch D 353
 354-6

Where personal property is bequeathed by a person not domiciled in this country, it is not, in the first instance, liable to legacy or succession duty on being paid to the legatee. But where the executor directed to collect foreign property and invest it here, has discharged the duty imposed on him, and has placed the fund, in the way required, in this country, any subsequent devolution of it becomes liable to duty, though the party on whom it may devolve may (like the testator) be domiciled abroad.

A. was domiciled in *Portugal*, but on a visit to this country made his will in the English form, and appointed executors, some of whom resided in *England*. He desired his executors to collect his property, which was in *Portugal*, to convert it into cash, pay certain legacies, and invest the residue in the English 3 per cents., to appropriate what they should think necessary to pay a life annuity of £50 to his sister, on the termination of which the appropriated fund was to revert to and form part of his residuary estate, and be divided (like the rest) among his three children. The executors exactly performed the directions of the trust; when the sister died the part appropriated to satisfy her annuity became divisible among the children:—

Held, that this constituted a succession within the meaning of the 2nd section of the *Succession Duties Act*, and was liable to the payment of succession duty.

Wallace v. The Attorney-General (1) commented on.

THIS was an appeal against a decision of the Master of the Rolls on the construction of the *Succession Duties Act*.

William Callanane, by birth an Irishman, had acquired a domicile in *Portugal*, where he had for many years carried on business as a wine merchant. He resided at *Oporto*, was married, and had three children, *William*, *Angelina*, and *Christina*, who resided at *Oporto*. He had also a sister, *Elizabeth Callanane*, who resided at *Limerick*, in *Ireland*. In 1853, being then very ill, he came to *London* for medical advice, and took lodgings in *Jermyn Street*. He executed a will in the English form, and died on the 11th of September, 1853. By his will he appointed four persons his executors, three of whom were resident in *London*, and one in *Oporto*. The will directed that his property which was (with the exception

(1) Law Rep. 1 Ch. Ap. 1. 11 Jan 25 1872.

of the money he had brought over to meet his personal expenses) situated in *Portugal*, should be collected by his executors and converted into cash, and, after paying certain specific legacies, the residue was to be invested in the English funds. The bulk of this residue was to be held on trust to be divided among his children on their arriving at a certain age, and the income to be applied in the meantime to their maintenance. He directed the payment of an annuity to his wife for her life—"and upon farther trust by and out of such dividends, interest, and income, to pay to my sister *Elizabeth Callanane* a clear annuity or yearly sum of £50 during her life, by equal half-yearly payments, &c.," and to pay these annuities the testator directed that the executors and trustees should "appropriate and set apart and retain in their names such an amount of the £3 per Cent. Consolidated Annuities out of his residuary estate as they should think expedient." These appropriations were to exonerate the rest of his estate therefrom, and he directed that when either of the annuities in respect of which the appropriations were made should cease and determine, the amount so appropriated should revert to and become part of his residuary estate, and, subject as aforesaid, was to be in trust for his son and daughters, to be then equally divided between them.

Elizabeth Callanane, the testator's sister, died on the 2nd of September, 1870, and the fund appropriated to the payment of her annuity then became divisible among the children. A Petition was presented in Chancery praying that this division might be made, and an order was made accordingly. The Registrar of the Court of Chancery, however, stopped the issuing of the order to enable application to be made to the Commissioners of Inland Revenue for a certificate that no succession duty was payable. They refused the certificate, and the Petition for payment was then served on the Attorney-General, when the Petition was re-heard before the Master of the Rolls, who, on the 8th of February, 1871, acting on the authority of the decision of Lord Chancellor *Cranworth* in *Wallace v. The Attorney-General* (1) declared his opinion that succession duty was not payable in this case, and made the order as prayed for (2). The Attorney-General appealed.

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(1) Law Rep. 1 Ch. Ap. 1. *11 Jan 25. 937*
 (2) Law Rep. 11 Eq. 378, *nom. Callanane v. Campbell.*

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The *Solicitor-General* (Sir G. Jessel), and Mr. W. W. Karslake, for the Crown :—

It is not disputed that legacy duty was not payable in this case on the property divisible among the legatees on the death of the testator. The rule in *Thomson v. The Advocate-General* (1) is not denied; but in the circumstances which exist here it has no application. Here a particular portion of the testator's property has been separated from the rest, and after the occurrence of a certain event, the death of the testator's sister, it reverted to the residue, and passed to the children. It passed as a "succession." The words of the 2nd section of the *Succession Duty Act* were intended to embrace a case like the present, and are extensive enough to do so. After the cesser of the annuity the fund appropriated to it devolved on the children. It was the devolution of a beneficial interest in property on the death of some one who had previously enjoyed the income from it. It was not a legacy under the will, it was a succession within the 2nd section of the *Succession Duties Act: Re Lovelace's Trust* (2). There, as here, a fund was appropriated to the payment of an annuity to the testator's wife for her life—it was to be subject to appointment—the donor of the power, then domiciled in *France*, exercised it in favour of two foreigners—the fund was in this country; it was held that this was a succession within the Act, Lord Justice *Turner* saying that the 2nd section applied "to the case of a succession, under a British settlement, of British property, vested in British trustees, and falling under the jurisdiction of a British Court." The reason which applies to exempt from duty under the Legacy Duty Acts legacies payable under the will of a person not domiciled in *England*, namely, that *Mobilia sequuntur personam*, does not apply to exempt such a devolution of property as this from the succession duty: *Re Wallop's Trusts* (3), where Lord Justice *Turner* referred to and expressly adopted the decision of *Re Lovelace*. The case of *Wallop's Trusts* shews that under the *Succession Duty Act* a legacy may be liable to succession duty though it might not have been liable under the Legacy Acts. To be exempt it must have been expressly exempted under those Acts: *The Attorney-*

(1) 12 Cl. & F. 1.

(2) 4 De G. & J. 340.

(3) 1 D. J. & S. 656.

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*General v. Fitzjohn* (1). Here what was done by the executors as to this appropriated fund operated a complete conversion of the testator's property, constituted it English property, and placed its administration under English law. As soon as this particular portion was specially appropriated under the directions of the will the Portuguese law ceased to have anything to do with it; it became English property, and as such became subject to duty on a new devolution. When the children became entitled to it in possession on the death of the testator's sister, they acquired a new property, by way of succession to some one else: *In re Badart* (2); *Re Smith* (3).

The Master of the Rolls in this case acted on the decision in *Wallace v. The Attorney-General* (4); but that case is not decisive of the present, and it has here been carried farther than is warranted by the decision itself. In *Badart's Trusts* Vice-Chancellor *Malins* expressed his belief that there had been some miscarriage in *Wallace v. The Attorney-General*, which, indeed, appears to have proceeded too exclusively on the ground on which *Thomson v. The Advocate-General* (5) was decided, although that related to statutes differently worded, and not intended to have such an extended application as the Legislature desired to give to the *Succession Duty Act*.

The Respondent did not appear.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, it appears to me that there can be no doubt upon the question which has been here raised before us, though, of course, it is to be regretted that no counsel should have attended on behalf of the Respondents. This was probably owing to the circumstance that the fund would scarcely bear the expense of such a case being argued by counsel. I think, however, that everything that could be suggested has been clearly and fairly put before us by the Solicitor-General, and we have the advantage of having the judgment of the Master of the Rolls containing the reasons which induced him to come to the conclusion at which he

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(1) 2 H. & N. 465. 10 June 1871 (2) 12 W. R. 933.

(2) Law Rep. 10 Eq. 288.

(4) Law Rep. 1 Ch. Ap. 1. 11 June 1871

(5) 12 Cl. & F. 1.

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arrived—a conclusion which, I apprehend, is different from that at which your Lordships will be disposed to arrive upon this question.

The real nature of the case is this: A person domiciled abroad has made provision by his will that a certain fund, which formed part of his foreign property, as we must call it, the property attached to his person, shall be invested in this country in Three per Cents., and that the fund so invested shall be settled in this manner, namely, to pay £50 a year to his sister for her life, and after her death to fall back into the residue of his property. Regarding this as a legacy to the sister, not a succession, no duty is payable upon it.

74D353 In order to have the personal property administered you must seek the forum of that country where the person whose property is in question had acquired a domicile. Then, when you obtain possession of that property, you do all which has to be done in the country to which the testator belonged. The question is afterwards, when the property has been so obtained and administered, and is in the state in which the testator desired it to be placed, in what condition do you find the fund? You find it in the condition of a settled fund. That condition arises no doubt from the operation of the testator's will; but I can see no difference, in consequence of that circumstance, from its having arisen in any other manner, as, for instance, from a deed executed in his lifetime, as might have been the case, or, supposing he had transmitted to his bankers a sum of money to be invested upon the same trusts. When there is any fund standing in this country in the names of trustees in consols or other property which has a *quasi* local settlement, which stock in the funds has, all the dividends having to be received in this country, and the persons who have to be dealt with in respect of it being persons residing in this country, that fund is subject to succession duty. The settlement provides for the succession, and the interest of each person on coming into possession is liable to the payment of duty upon that interest to which he so succeeds. That is really the whole question involved in this case.

The difference between the case of *Thomson v. The Advocate-General* (1) and this case is perfectly plain and manifest. The

difference is exactly the same between this case and that which was last referred to, namely, *Wallace v. The Attorney-General* (1). In each of those cases the Court had to deal with a fund which was to be administered, and which was in the course of administration, before the executor, or the person upon whom the duty of administering it was imposed, had cleared himself and discharged himself of that duty. In those cases, he being a foreigner (we must take him to be a foreigner, because the original owner of the property was a foreigner) you have nothing to do as regarded the reception of the duty levied by the Acts of Parliament on that person whom you are pursuing before a foreign tribunal. But when the duties which have been imposed upon him involve the placing of the money here in funds within the functions of the judicature of this country, and when you find those funds in a state involving succession from one individual to another, then the duty has accrued, and you proceed to levy it.

It appears to me that the only course we can take in this case is to vary the order which was made by the Master of the Rolls, upon the petition of those who claimed to be entitled to the fund, directing that it should be paid over free from succession duty, and to insert a direction that the payment to those persons shall be made after first deducting and paying the succession duty to which it is liable.

LORD CHELMSFORD entirely agreed.

LORD WESTBURY :—

My Lords, I hardly know whether I am justified in making any observation on this case, but I will say in the first place that the Crown has done very right in bringing the case here, for otherwise it might have been a precedent for many inconvenient decisions. There is no difficulty at all in the matter, and if the general rules of law were more steadily kept in view it would be unnecessary to range up and down a variety of decisions, because these rules would afford the best answer, and secure the removal of every difficulty.

If a man dies domiciled abroad possessed of personal property,

(1) Law Rep. 1 Ch. Ap. 1.

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the question of whether he has died testate or intestate, and also all questions relating to the distribution and administration of his personal estate, belong to the judge of the domicile, and that on the principle of *mobilia sequuntur personam*. His domicile sets up the forum of administration. Now, apply that to the present case. The legatees would resort to that forum to receive their legacies, and the executors and trustees, when the residue has been ascertained, would resort to that forum to receive it. When they have received it the legacy is discharged, and all things that are incidental to the legacy cease. They receive it bound with the duty of bringing it to this country and investing it here in consols, which they are directed to hold upon certain trusts mentioned by the will. But the character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will. There is, therefore, a settlement made of the property which is brought into this country and invested here in such mode of investment as gives to the property whilst it remains here the character of English property in respect of locality.

That settlement so made, undoubtedly becomes subject to the rules of English law under which it is held, by virtue of which it is enjoyed, and under which it will be ultimately administered. That, therefore, is a description of ownership which falls immediately within the provisions of the *Succession Duty Act*. There can be no doubt that when a partial interest created by one of the trusts so directed to attach upon the residue after it has been received and invested, and when all the purposes of the administration have been answered—when such a partial interest, I say, ceases, and the interest next in order comes into being, succession duty attaches upon that devolution of property.

Now, all this is an immediate consequence of the first principles of law, and the Master of the Rolls has been misled by language which was used by Lord *Cranworth* in the case of *Wallace v. The Attorney-General* (1), where the extraordinary conclusion was contended for, that under the will of a gentleman dying domiciled abroad the first legatee, though he was not liable to legacy duty, became liable to succession duty under the Act. It is quite clear

(1) Law Rep. 1 Ch. Ap. 1. 11 June 1859.

that you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property ; but after the purposes of administration have been answered and distribution made, if a party taking this distributive part comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property, and is no longer to be dealt with as if it was merely a portion of a foreign testator's estate to be received in the course of administration.

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LORD COLONSAY concurred.

Ordered and adjudged, that the Order of the Master of the Rolls of the 8th of February, 1871, be varied by inserting, after the direction for the payment of costs, the following Order, namely :  
“And it is ordered that after such payment of costs the succession duty on the said Bank Annuities, in respect of the succession thereto upon the decease of *Elizabeth Callanane*, shall be paid.”

*Lords' Journals*, 22nd April, 1872.

Solicitor for the Appellant : *Solicitor of Inland Revenue*.

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March 8, 11;  
April 19.

CHARLES HENRY ANSLEY MARTELLI . APPELLANT ;

AND

H. F. KINGSFORD HOLLOWAY AND }  
HORATIO EDWARD HOLLOWAY . . } RESPONDENTS.*Will—"In possession"—"Provided always"—Estate tail by Purchase—  
Perpetuities.*

24 Ch D 106

The phrase in a will "estate tail in possession" does not necessarily mean actual possession, but may be construed as meaning entitled to a vested estate tail in the property, though it may be vested in remainder and the party entitled may not be in actual possession, a previous life estate existing at the time.

*Foley v. Burnell* (1) adopted.

There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but, if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will.

Where there has been a decree, (all the parties interested being before the Court,) long acquiesced in, which declared a direction for accumulation to be void for remoteness, but also declared that the will was well executed, and that the trusts thereof (except that direction) ought to be carried into effect, the presumption will be that a possible objection to a similar clause in the will had not been overlooked, but had been considered and decided on before the declaration to carry the trusts of the will into execution was made.

The words "provided always" are to be considered as words of reference to all that has gone before them. They constitute a qualification of the preceding limitations.

A testator after giving several legacies directed his trustees to invest dividends, and rents, and profits, and the annual proceeds of his real and personal estates, during the time that any person beneficially interested in those estates should be under twenty-one, in order to accumulate the personal estate. They were then to hold his real and personal estates for his first grandson, the eldest son of his daughter, then living, for his life, and after his decease for the first and other sons of that grandson in tail, remainder over to the other sons of the daughter. After other remainders there was an ultimate trust for the testator's right heirs and next of kin according to the nature and tenure of the trust estates respectively. Then followed this proviso: "I declare it to be my will and meaning, that such person as shall under this my will be entitled to an *estate tail in possession* in my real estate, shall not

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

be *absolutely entitled* to my leasehold and *personal estates* until he, &c., shall attain the age of twenty-one, and that my leasehold and personal estates shall *absolutely belong only* to such person, &c., as shall first attain the age of twenty-one and become entitled to *an estate tail in possession* in my real estate under the trusts aforesaid." The eldest grandson was in possession of the life estate—his eldest son died under twenty-one without issue—but his second son attained that age during his father's lifetime:—

*Held*, that this proviso was not a new and independent disposition, but a qualification of all the preceding limitations:

*Held*, also, that the second son fulfilled all the conditions of the proviso and was absolutely entitled to the personal estates.

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THIS was an appeal against a decision of Vice-Chancellor *Stuart*.

*Thomas Holloway*, by his will dated the 2nd of September, 1813, devised all his property real and personal to three trustees. After giving certain pecuniary legacies he devised all his real and leasehold and other personal estate to trustees upon trust to convert his personal estate and invest the dividends thereof, and also the rents and profits of his real estate from time to time as and when and so often and during all such times as any person or persons beneficially interested in or entitled to his real and personal estates under the trusts thereafter declared thereof should be under the age of twenty-one years, adding all such investments to his personal estate, in order to accumulate the same; to pay to each of his grandchildren not entitled to his real and personal estate the sum of £1000. And, subject to the trusts thereinbefore declared as to his freehold, copyhold and leasehold, and real and personal estates thereby devised and bequeathed, and the stocks, moneys, and securities to be purchased and invested as aforesaid, the said trustees were to stand seised and possessed thereof to the use of the testator's grandson, the first or eldest son then living of his daughter *Catherine*, and then of the age of five years or thereabouts, during his natural life, and from and after his decease for the first and every other son of that son successively, according to seniority, and the heirs of their respective bodies, and on failure, &c., for the second and third and every other son of his said daughter in like manner, with remainders over to the daughters of the eldest grandson as tenants in common, and the heirs of their respective bodies, with divers remainders over, and an ultimate trust for the testator's right heirs and next of kin according to the nature and tenure



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of the trust estates respectively. Then came this proviso: "Provided always, and I declare it to be my will and meaning, that such person or persons as shall under this my will be entitled to an estate tail in possession in my said real estate, shall not be absolutely entitled to my leasehold and personal estates until he, or she, or they respectively shall attain the age of twenty-one years, and that my said leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years, and become entitled to an estate tail in possession in my real estate under the trusts aforesaid, and in the meantime the same leasehold and personal estates shall remain subject to the trusts hereinbefore declared thereof notwithstanding any thing hereinbefore declared to the contrary."

The testator died on the 22nd of January, 1816, leaving *Catherine* (the wife of *H. Martelli*) his only child and heiress-at-law. Mrs. *Martelli* had three sons, *H. F. Kingsford Martelli*, *Charles Henry Ansley Martelli* and *Thomas Chester Martelli*. The latter of these two had since died, and the former is the Appellant in this case.

Immediately after proving the will the trustees instituted a suit in the Court of Chancery to have the trusts of the will carried into effect under the direction of the Court. Lord Chancellor *Eldon*, in 1820, pronounced a decree declaring that the eldest grandson (*H. F. Kingsford Martelli*), an infant, took a vested estate for life, and that the trust for accumulation was void for remoteness (1).

*H. F. Kingsford Martelli*, the eldest son, entered into possession of the estates, and took the name and arms of *Holloway*, in accordance with a provision in the will. He married and had six children: *Charles Breton Holloway* (who died before he became of age), *Horatio Edward Holloway* (who attained twenty-one on the 8th of November, 1867, and is one of the two Respondents), *Francis Holloway*, and three daughters.

*Charles Henry Ansley Martelli* (the second son of *Catherine Martelli*) claimed the beneficial interest in the leasehold and personal estates of the testator, on the ground that they did not vest in *Charles Breton Holloway*, the first person entitled as tenant in tail (who died before he became of age), but, on his death, resulted,

(1) 2 Sw. 432.

subject to *Kingsford Holloway's* life interest therein, for the benefit of the testator's daughter *Catherine*, the widow of *H. Martelli*, and the next of kin.

In March, 1864, *Kingsford Holloway*, the tenant for life, filed his bill against the trustees and the various parties interested (including the next of kin of the testator) praying for an assignment to himself of the leasehold and personal estates of the testator, that the suit might be taken as supplemental to that of *Marshall v. Holloway*, and for farther relief.

In December, 1864, the Defendants put in a joint and several answer to this bill.

In February, 1868, *Horatio Edward Holloway*, the second (but the elder surviving) son of *Kingsford Holloway*, having attained twenty-one, filed his bill in Chancery against the trustees and all proper parties, praying that it might be declared that in the events which had happened he, the Plaintiff, and his father *Kingsford Holloway*, were alone entitled to the leasehold and personal estates of the testator; that proper directions might be given for the conveyance and assurance of the freehold and copyhold estates of the testator, and for the assignment of his leasehold and personal estates to the uses and trusts of the will; that this suit might be taken as supplemental to that of *Marshall v. Holloway*; and for farther relief.

In April, 1868, these suits came on to be heard together before Vice-Chancellor *Stuart*, upon motion for a decree. By a decree made on the 15th of July, 1868, His Honour declared that, according to the true construction of the will, *Horatio Edward Holloway*, the first tenant in tail under the will who had attained the age of twenty-one years, was, subject to the life interest of *Kingsford Holloway* (his father), absolutely entitled to the leasehold and personal estates of the testator; and conveyances and assignments were ordered accordingly (1). This decree was enrolled in November, 1868, and this appeal, by *Charles Henry Ansley Martelli*, was then brought. *H. F. Kingsford Holloway*, the tenant for life, had died since the decree, and *Horatio Edward Holloway* then entered into actual possession of the estates.

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(1) *Holloway v. Holloway*, Law Rep. 6 Eq. 523.

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The *Solicitor-General* (Sir G. Jessel), and Mr. Charles Hall, for the Appellant :—

The real question to be determined here is the construction of the proviso. That not merely cuts down the previous gift, but it is more than a mere proviso having that effect; it is a dispositive clause, and must be construed as such. If so construed it must be treated as disposing of the personalty in the same manner and for the same purposes as the direction for accumulation, which has already been declared void. No words can be added to it by implication. The Vice-Chancellor really attempted to add to it words which he thought he might introduce by construction, treating the words "entitled to an estate tail in possession" as if they were "estate tail in possession by purchase." He thought that he was justified in doing this by the authority of *Christie v. Gosling* (1). But the two cases materially differ from each other. In that case the proviso was referential, here it is independent and it must be so construed. It introduces a new class too remote, by law, to take. The personalty did not vest here in the first tenant in tail: *Dungannon v. Smith* (2), nor has it since vested in the Respondent.

The personalty here was not to vest except in a person who fulfilled these conditions—he was to be tenant in tail of the real estate, and in possession, and he was to be twenty-one years of age. If all these conditions were not fulfilled he had no title to it. Here the first tenant in tail had died under twenty-one; the personal estate, therefore, did not vest in him. The next tenant in tail was the Respondent, but he was not tenant in tail in possession, for when, by the death of his elder brother, he became entitled to the estates as tenant in tail, he had but a bare title and not the possession, for that was in his father, the tenant for life. The words "in possession" cannot be rejected, they are a substantive part of the gift, and they must mean actual possession: *Scarsdale v. Curzon* (3). In no way were the words of the proviso complied with, and the personal estate consequently went to the next of kin. *Harrington v. Harrington* (4), and *In re Johnson's Trusts* (5), do not affect

(1) Law Rep. 1 H. L. 279.

(2) 12 Cl. &amp; F. 546.

(3) 1 Jo. &amp; Hem. 40, 65–6.

(4) Law Rep. 5 H. L. 87.

(5) Law Rep. 2 Eq. 716.

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this case. The provisions in the wills there are entirely distinct from those which are to be found here.

The parties here are not absolutely bound by the former decision in this case, but are entitled to bring before the Court the construction of the proviso. The declaration formerly made that the trusts of this will are to be carried into effect does not affect the devolution of the personal estate under this proviso, the construction of which does not appear to have formed part of the original decision. This is a suit to carry the decree then given into execution; but to have that result it must be shewn to be correct in itself, and to embrace the subject-matter now under discussion. *Lechmere v. Brasier* (1), *O'Connell v. M'Namara* (2), *Stamer v. Nisbitt* (3), and *Hamilton v. Houghton* (4), shew that a decree is not to be extended to matters not necessarily nor expressly contained in it. And in *Gooch v. Gooch* (5) it was declared that a decree to execute the trusts of a will does not make valid trusts which on the face of the will are bad. Lord *Eldon's* decree, therefore, though perfectly good as to the accumulations, leaves the case open to discussion as to the meaning of this proviso, and that decree applied to the present case shews that the direction for accumulations being bad, the whole provision relating to the personal estate failed of effect and it passed to the next of kin.

Sir *R. Palmer*, Q.C., and Mr. *Waley*, for the Respondent:—

The case of *Foley v. Burnell* (6) is a complete authority for what has been done here. The principle there laid down was worked out in *Christie v. Gosling* (7) and in *Harrington v. Harrington* (8). If there are words in a will capable of an interpretation indicating an intention which the law will not allow to be carried into effect, and also capable of indicating an intention which the law will permit to be carried into effect, the Court will give them the latter interpretation, and the more so if that is, as it is here, in accordance with the plain desire of the testator, as shewn in the other parts of the will. The decision of Lord *Eldon* on the question of

(1) 2 Jac. & W. 287.

(2) 2 D. & War. 411.

(3) 2 J. & Lat. 447.

(4) 2 Bli. 169.

(5) 3 De G. M. & G. 366.

(6) 1 Bro. C. C. 274; affirmed 4 Bro. P. C. 319.

(7) Law Rep. 1 H. L. 279.

(8) Law Rep. 5 H. L. 87.



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remoteness was confined to the direction as to accumulations—he held that that direction was void for remoteness, but as to the rest he expressly declared that “the will was well executed and proved, and that the trusts thereof ought to be carried into execution” (1). That really decided the present case. It is impossible to believe that, having the whole will as well as all the parties before him, he would make that declaration if he thought that this proviso as to the vesting of the personal estate was open to the same objection as that which affected the direction for accumulations. There is no authority for the proposition that when the Court has made a decree which has never been reversed, nor even attempted to be reviewed, it shall yet at a distant time, when it is sought to be enforced, be denied its due operation. *Scarsdale v. Curzon* (2) does not at all impeach the construction which has been put on this will.

Mr. *Eddis*, Q.C., and Mr. *F. M. Robinson*, appeared for the personal representative of the tenant for life, but he not having joined in the appeal, they were not permitted to address the House.

The *Solicitor-General* replied.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, this is an appeal from a decision of Vice-Chancellor *Stuart* founding itself upon a decree of your Lordships’ House in *Christie v. Gosling* (3) as to the construction of a will. The Appellants insist that, regard being had to a proviso therein contained, the bequest, which is in the prior part of the will, and was inserted with reference to the disposition of the personalty, has become ineffective, owing to the attempt made on the part of the testator to create a series of limitations of his property which would offend against the law established to prevent the creation of perpetuities. And the Appellants in this case have greatly relied upon a decision by Lord *Eldon*, which, singularly enough, took place in the year 1820, upon a clause of this very will—but affecting another portion of the will and another series of trusts—in which it was held by that great authority, that the provisions of the will, as far as regarded

(1) 2 Sw. 450, 451.

(2) 1 Jo. & Hem. 40, 65–6.

(3) Law Rep. 1 H. L. 279.

*59 H.L. 521*

the particular points there decided, were such as to offend against the law as to perpetuities.

The testator here, who died as long ago as the year 1816, created a series of trusts on his real and personal estate, by which he intended (as has often been the case in wills of a similar description) to carry the real estate and the personal estate together as far, at all events, as the skill of the draughtsman could achieve that object. And he seems farther also to have desired to tie up the estate, and to render it inalienable, so far as he could, within the limits of the law, contrive so to do. The direction which he gives first as to the accumulation of rents and profits of his real estate and the interest and income of his personal estate is one that is struck at by the decree of Lord *Eldon*. After directing the payment of his debts from his personal estates, and after directing the investment of the surplus remaining after the payment of his debts, the testator directs that his trustees shall invest the rents and profits of the real estate, and the dividends, interest, and other proceeds of his personal estate, "from time to time as and when and so often and during all such times as any person or persons beneficially interested in or entitled to my real and personal estates under the trusts hereinafter declared thereof shall be under the age of twenty-one years, adding all such investments to my personal estate in order to accumulate the same." That was the trust that was then complained of.

Then we must look to the trusts of the real and personal estate, and they were these:—He first of all created an interest for life in a boy, his grandson, there described, I think, as being of five years, the son of his daughter *Catherine*. Then from and after his decease upon trust for the first and every other son of his body successively issuing in priority according to their seniority of age, and the heirs of their bodies respectively. That is enough, I think, to read with reference to that limitation; so that he created a life estate in this grandchild, and then he created a series of estates in succession in the first and other sons of that grandchild; and that carried both the real and the personal estate. Then the result of his direction for the accumulations of the rents and profits of the real estate, and the income of the personal estate of this property, was held by Lord *Eldon* to amount to a direction that so long as there should be any

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person under the age of twenty-one years taking an interest as a tenant in tail under the limitations contained in this will, the accumulations should continue until the person so taking the estate tail should have attained the age of twenty-one years. That of course, regard being had to the limitations of the real estate, would necessarily create a perpetuity, because any son of his grandchild taking an estate tail and dying (as actually happened in the case before us) during the lifetime of his father the tenant for life, and leaving (which has not occurred here) a son to take as tenant in tail by descent from him, would produce a state of things in which there would be a tenant in tail, namely, the great grandson's son who would take by descent from his own father, through himself being the grandson of the first taker under the will; and that tenant in tail by descent might die under the age of twenty-one having married at the age of eighteen or nineteen (as might possibly be the case) leaving another child to succeed him as tenant in tail by descent, and so on, leaving the estate (as Lord *Eldon* expressed it in one of the numerous cases which are to be found in the books upon the subject) leaving the estate to travel through minorities for centuries. And accordingly the accumulation would be directed for a period which the law undoubtedly would not allow.

That being so, the learned Judge came to the conclusion that the whole of that trust for the investment of the rents and profits of the real estate, and the accumulation of the dividends of the personal estate, was void as being too remote. And accordingly, in the bill filed in 1816 for carrying into effect the trusts of the will, a decree was made, dated in 1820, which declared that the trusts as regarded this matter of accumulation were void; but it declared expressly that the trusts of the will ought to be carried into execution except as regards those trusts so declared to be void; and in respect of that portion of the trust which was declared to be void there was, of course, an intestacy. It was necessary to strike out those clauses altogether from the will, and to read the will as if they had never been inserted.

Now it is said that that decision ought to govern the case which is now brought before your Lordships by appeal. After those limitations of the real and personal estate of the testator's grand-

child, who was five years old, for his life, with remainder to the first and other sons of that child successively in tail, there comes a proviso, "Provided always, and I declare it to be my will and meaning, that such person or persons as shall, under this my will, be entitled to an estate tail in possession in my said real estate, shall not be absolutely entitled to my leasehold and personal estate until he, she, or they respectively shall attain the age of twenty-one years, and that my said leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years, and become entitled to an estate tail in possession in my real estate under the trusts aforesaid, and in the meantime the same leasehold and personal estates shall remain subject to the trusts hereinbefore declared thereof, notwithstanding anything hereinbefore contained to the contrary."

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As regards the trusts for accumulation, of course those have been struck out, and have been considered, under the decree of Lord *Eldon*, as if they were entirely effaced from the will. The other trusts have been directed to be carried into execution, and the decree of Lord *Eldon* is set out *in extenso* in the Appendix. It occupies a very large portion of the Appendix, because the decrees of that day contain all the pleadings and all the proceedings; and there is an express declaration of the trusts upon which the property would be held when that excepted portion had been taken out of it, which were the trusts, in fact, following the very words of the will, and on that account, I suppose, declaring, both as to real and personal estate, an estate for life with remainder to the first and other sons and their issue. But of course as to the personal estate, the personal estate could not descend in any way to the persons who would be tenants in tail of the real estate, but the personal estate must go to the first tenant in tail, whoever he may be, and, unless it is excluded by this proviso, must go to him absolutely.

Now I can quite understand why the conclusion may have been come to as to the accumulation of the personal estate, wholly without reference to the question which is now brought for your Lordships' consideration; because it was evidently the intention that one common fund should be formed of the rents and profits of the real estate, and the income of the personal estate. That being so,



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the rule which was applied in *Christie v. Gosling* (1) would hardly be that which would occur to the mind of Lord *Eldon* when he decided the case of *Marshall v. Holloway* (2), inasmuch as what was aimed at by the direction in *Marshall v. Holloway* was the accumulating of one entire fund compounded of two sets of accumulations, the accumulation of rents and profits of the real estate, and the accumulation of the dividends of the personal estate. Wholly without regard, therefore, to any application of such a rule as was applied in *Christie v. Gosling* (1), the Court might well have held that it was intended to form one compound accumulation fund, which compound accumulation fund could not be formed, with reference to the rents and profits of the real estate, under any circumstances, because there the accumulation might travel on during many minorities, and the application of the rule since made in *Christie v. Gosling* (1) was interfered with by these two funds being fused into one common fund, which was to go over when the purpose of the accumulation should have been answered. And I apprehend that the matter had not been so closely looked into at that time, probably even by so great a Judge as Lord *Eldon*, as it afterwards came to be when *Christie v. Gosling* (1) was under consideration. But, independently of that consideration, one can well see that there were grounds affecting the accumulation of the rents and dividends, and the formation of one common fund out of them, which would not apply to the present case, by way of defeasance of the interest in the personal estate created by the proviso we have now to consider.

It is also worthy of remark that that decree, so far as it goes, sustains the contention of the present Respondent very materially in this view. Lord *Eldon*, having the whole will before him, and having all the parties interested before him, did make an express declaration as to part of the will, that it went beyond what the law allowed, and must therefore be effaced from the will. And he made a declaration that, except as to that particular, the whole trusts of the will should be performed and carried into execution.

Now, coming to this proviso, the whole question is, whether the rule can be applied, under the circumstances of this case, to the construction of the will which was applied in *Christie v. Gosling* (1),

(1) Law Rep. 1 H. L. 279.

(2) 2 Sw. 450-451.

and was a most wholesome and (if I may be allowed to say so of what has now become a settled rule) a most correct canon of interpretation applied to wills of this description, where it is attempted to knit together as long as possible the course of devolution of real and personal estate. There occur constantly cases of that description—provisions for keeping and tying up the personal estate as long as the law will allow, amongst other provisions of a character similar to that which we have now to consider. And in the case of *Christie v. Gosling* (1), the Court laid down this rule, that, if you find a proviso which apparently might seem to carry the suspense of the vesting of the personal estate through a period of minorities which might last, as has been said, in certain events, for centuries, because the proviso which affects to make a defeasance of the personal estate speaks of those who take under the previous limitations of the will, which, as far as the previous limitations of the will refer to real estate, might continue in a series of descents from the first taker by purchase to the issue in tail, in such a manner as to carry on that descent through a series of descendants in tail who might never attain the age of twenty-one, but might be in a condition to leave issue. If, said the noble Lords, who took part in advising the House in *Christie v. Gosling* (1), when we are considering the question of personal estate we must take care to refer it wholly to the matter which the testator had in hand. He is speaking of a defeasance with reference to something he has done with his personal estate. That defeasance is not to be looked at with reference to provisions which have no concern with personal estate at all, unless those provisions are plainly and distinctly introduced as collateral events which are to limit the course of the personal estate. But we are to consider that he is only speaking of his personal estate, and of those who take an interest in that personal estate. Although the words may be considered to be general, and may appear to include those who take an interest in the real estate also, yet, regard being had to its being a limitation affecting only the bequest which the testator has made of his personal estate, you cannot conceive that he would introduce that limitation with reference to others, and with reference to what may be happening to others in whom no such interest

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can exist. He must be conceived as intending to defeat the interest of those who had an interest in some estate or benefit under his will. Therefore, when you find this clause saying that the interest is to be defeated in the event of the persons who take that personal estate under the will dying under the age of twenty-one, or the like, you must necessarily confine it to the persons who take by purchase under the limitations of the will, it being a case of personalty. Because there is no person whatever who takes any interest in personalty by way of descent. And as to the persons who take by purchase, if the will is properly drawn (and it is conceded that this will is properly and perfectly drawn), as to the persons who take by purchase, you can apply it to those only who take by purchase, because they are the only persons who take an interest in the personal estate at all.

Now the persons who take by purchase are properly limited to those who take during the life of their parent, the testator's grandson. And the clause restricting it deals only with those persons who, taking during the life of that grandson, take an interest in the personalty as purchasers. And as it regards all those persons who must come into *esse*, of course, during the life of their father, or the period allowed by the law for gestation afterwards, you may impose a condition upon them as to their taking, saying that in the event of their not attaining the age of twenty-one that property so given to them as purchasers, shall cease, with regard to them, in consequence of their not attaining that age, and shall pass on, in any way you may be minded to pass it on, in the terms of the will.

My Lords, it seems to me that in substance this case is not distinguishable from the case of *Christie v. Gosling* (1) in that respect; because what the testator does by this proviso is simply this: He provides and declares that such person as shall, under the will, be entitled to take an estate tail in possession "in my said real estate shall not be absolutely entitled" to the personal estate until he or she shall attain the age of twenty-one. That does not mean any person who shall take an estate tail by descent, because the decision in *Christie v. Gosling* (1) says that no such person as that could take an interest in the personal estate. The testator says

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the person he is speaking of as having an estate tail in possession shall not be entitled to the personal estate until he attains the age of twenty-one. That is, he means only those to be entitled in tail who, under the limitations of the will, could take the personal estate, that is, those who take as purchasers, and the subsequent words make that plain, if there could be any doubt, because he farther says, "that my leasehold and personal estate shall absolutely belong to such person or persons who shall first attain the age of twenty-one years and become entitled to an estate tail in possession under the trusts" therein declared. And that in the meantime they shall go according to the trusts "contained in my will."

Now the only possible question that could arise to distinguish this case from the case of *Christie v. Gosling* (1) is this, which has arisen upon the facts which were before the Court when the appeal was first presented. It appears that by a subsequent event which has happened even that question, if question it be, has been disposed of. The facts are these:—The tenant for life was alive at the date of the hearing of the cause before Vice-Chancellor *Stuart*, and at the date of the presentation of this appeal. The tenant for life had a first or eldest son, but that eldest son had died, whilst taking an interest in the estate tail, of course, as he did, in reversion, subject to his father's life interest. He died and left no issue. The second son, the person who has been declared to be entitled to the personal estate by the decree of the Vice-Chancellor, would then come in as tenant in tail in remainder after his father's life estate—he was also for some time an infant—but he has now attained, and at the hearing of the cause before the Vice-Chancellor he had attained, the age of twenty-one years. He was therefore tenant in tail in remainder with an absolute vested interest, and he had attained the age of twenty-one years.

But then it is said that the estate is only absolute in the case of those who shall have attained the age of twenty-one and become tenants in tail in possession. But it so happens that except for form's sake it is not in any way necessary to deal with that question, because since this appeal was presented, and since the hearing before the Vice-Chancellor, the father has died, and this gentleman has become the tenant in tail in possession, he is of

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the age of twenty-one years, and holds the estates, according to the rule stated in *Christie v. Gosling* (1); and the limitation is not void or in any way erring against the rule as to perpetuity. I therefore hold that the eldest son's interest was defeated by his dying under the age of twenty-one, and that the second son, now that he is actually tenant in tail in possession, and has attained the age of twenty-one, has beyond all dispute an indefeasible interest under the proviso of the will.

The only remaining question would be in point of form, whether, as in the case of the decree in the *Duke of Newcastle v. Lincoln* (2), the Court should take any notice of the occurrence which has taken place since the original hearing, namely, the death of the tenant for life bringing the tenant in tail in remainder into actual possession. I confess, my Lords, that I do not think it necessary to do so. I think the case of *Foley v. Burnell* (3) is a decision expressly in point upon this subject, and that it is quite sufficient to enable us to read this clause as one in which the testator has used the expression "in possession" as meaning entitled to a vested estate tail in the property, though it may be vested in remainder, and the party entitled may not be in actual possession; because in that case of *Foley v. Burnell* (and there never was a stronger case upon the subject) the Lord Chancellor relied upon the evidence of the intention to keep the real and personal estate together as long as possible, and yet held that in reality that could not be effected under any possible mode of construction which could be arrived at under that will; and though there was a limitation to the father for life, and a direction that certain personal chattels (plate, I think, was the subject matter) should go as heir-looms to the one who should take an estate tail in possession, it was held that the true effect of the expressions used in that will was that an infant who took an absolute vested estate tail under the limitations of the will during the lifetime of the father, and then died during infancy (there being no provision there with respect to attaining the age of twenty-one) was entitled to the heir-looms, and those heir-looms did consequently vest in the infant; and, in the event which happened, the father, being the

(1) Law Rep. 1 H. L. 279.

(2) 3 Ves. 387-397.

(3) 1 Bro. C. C. 274, affirmed 4 Bro. P. C. 319.

administrator of the infant, became entitled to those heir-looms. No doubt the general intention of the will was to prevent it if possible; but when fairly considered there was no rule which the Court could devise that would effectuate the intention of the testator more completely, or, in fact, which would effectuate it at all. There were many other events which might have occurred which would have been equally embarrassing with reference to any construction to be given to the will. Therefore the Court held that what in reality the testator intended to do was this: he said, "When any person becomes actually entitled to the full benefit and complete interest in the real estate, that same person shall from that moment become entitled to the heir-looms;" the distinction being not between the manual possession of the rents and profits and the holding of the estate in remainder, but between a vested interest and a contingent interest in the estate tail that was so limited. And in this case of *Marshall v. Holloway* (1), Lord Eldon adverts in some measure to that distinction, and speaks of cases in which it has been held that the word "possession" is capable of a meaning which may not refer to the actual manual possession of the rents and profits. In fact, if that was contended for in the case of an outstanding lease, it would be difficult or impossible to hold that a person was entitled to possession in that sense, inasmuch as the tenants would have the possession, and the property would not be in that sense in possession of the person entitled—he would be in possession of the rents and profits, but not of the estate itself. But in the case of *Foley v. Burnell* (2) the difficulty really existed, and a construction had to be put in that case upon the whole intent and meaning of the will. And I think that that authority is strong enough to justify your Lordships in arriving at the conclusion that the Vice-Chancellor was right in making the declaration, even when the father was living, and holding that this gentleman was entitled to the absolute interest in the rents and profits of the personal estate under the events which have happened.

My Lords, I have only farther to say, that this being a question upon the construction of a will, as to which there is undoubtedly some degree of difficulty, and there being that decision of Lord

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*Eldon* as to the question of accumulation of rents and profits, which might have led the persons who advised this appeal to the inference that a similar conclusion might possibly be still farther extended; I think we shall be doing justice to all parties if we affirm the decree of the Vice-Chancellor without personal costs, leaving the costs to be paid out of the testator's estate.

LORD CHELMSFORD:—

My Lords, the question upon this appeal is, whether the proviso following immediately upon the whole of the limitations contained in the will of *Thomas Holloway* is a qualification to be engrafted on the prior limitations, or an independent disposition adding a new class to the objects of those limitations.

In construing a will the whole of it must be taken into consideration to arrive at a testator's intention. And with this view it is not unimportant to observe that the testator knew the difference of the law as to real and personal estate, and had apparently, throughout the will, constantly before his mind, the law against perpetuities, limiting his estates, not to the first and other sons of unborn children, but to those unborn children in tail.

It was said in argument that you are not in the construction of a will to take first the law against remoteness, and then apply the words of the will to the law, but to construe the words of the will, and afterwards apply the law to them. But in endeavouring to ascertain the meaning of the testator in a clause of his will which is ambiguous, and which, read in a particular way, sins against the law as to perpetuities, it is not improper to take into consideration that in the whole of the will he has carefully provided that the limitations of his estates shall not be open to the objection of being contrary to that law. And if the clause in question is capable of two constructions, one of which would render it void upon a ground which the testator throughout his will seems to have been anxiously guarding against, and the other of which is reconcilable with all his previously expressed intentions, there can be no doubt which of them ought to be adopted.

It is unnecessary to consider the limitations of the will except for the purpose of remarking how carefully the testator has, in the whole series of them, taken especial care to limit his estates to

unborn children in tail, and also to make all the tenants in tail to take by purchase.

At the close of the limitations, and beginning with the words "provided always," which are words of reference to all that has gone before, comes the clause in question. This is said by the learned counsel for the Appellant to consist of two parts, the one declaratory, and the other dispositive; the dispositive part introducing a new class of objects which is too remote to be enabled by law to take under the disposition. If the proviso is to be so divided, the latter part of it would, in terms, extend beyond tenants in tail taking by purchase; but I read it altogether as one and indivisible, and then it is capable of an interpretation which will make it not a new and independent disposition, but a qualification of all the preceding limitations.

The latter part of the proviso appears to me to be almost a repetition of the former negative part in a positive form. The words are, "I declare it to be my will and meaning that such persons as shall, under this my will, be entitled to an estate tail in possession in my real estate shall not be absolutely entitled to my leasehold and personal estates until he or they respectively shall attain the age of twenty-one years." The only person who could become first entitled to an estate tail in possession under the will, and who would become thereby absolutely entitled to the leasehold and personal estate, would be a tenant in tail by purchase; and this part of the proviso does not touch the case of a person becoming tenant in tail on reversion, or that of a person becoming tenant in tail in possession, and dying under twenty-one and being succeeded by an heir in tail under twenty-one. But then the positive part of the proviso continues, without any break, in these words, "and that my said leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years, and become entitled to an estate in possession in my real estate under the trusts aforesaid." As observed by Lord *Eldon* in *Marshall v. Holloway* (1), "the testator has not said that they shall not be beneficially interested; but shall not be absolutely entitled."

I think, in fair construction, this latter part of the proviso must be taken to refer to the same class of persons as the former does;

(1) 2 Sw. 450-451.



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and then, with a slight transposition of the words, which does no violence to their obvious meaning, the testator declares that his leasehold and personal estates shall belong only to such person or persons as shall become entitled to an estate tail in possession in his real estate under the trusts aforesaid, as shall first attain twenty-one years.

It is observable that this proviso is framed with an express reference to the trusts of the will; and therefore it appears, not only by its introductory words, but by this reference, to be a declaration that it is meant to be a qualification of the preceding limitations.

Now, a tenant in tail under the trusts of the will is one who in the first instance would take by purchase; and as such tenant in tail would become absolutely entitled to the leasehold and personal estate, the referential proviso must be applied to such person or persons. It therefore cannot be construed to be a disposition to a new class, and so to have a tendency to create a perpetuity, but it must be read as if it were interwoven with the limitations and as qualifying them all by a condition imposed upon the tenant in tail in possession in respect of the leasehold and personal estate, and not as a description of the persons who are to become entitled to an estate tail, other than those who are comprehended within the limitations in the will. In this view the case appears to me to fall within the principle of *Christie v. Gosling* (1), and that the decree of the Vice-Chancellor is right, and ought to be affirmed.

With respect to the minor question, as to the declaration that the Plaintiff, having attained twenty-one, is (subject to his father's life estate) absolutely entitled to the leasehold and other personal property, I agree with my noble and learned friend on the woolsack; but as the words of the will in this respect raise a fair question for consideration, I think the appeal should be dismissed without costs.

LORD WESTBURY:—

My Lords, I quite agree with the contention of the Respondent that the argument we have heard, the case made on behalf of the Appellant, is not consistent with the decree of Lord *Eldon*. The

(1) Law Rep. 1 H. L. 279.

bill filed before Lord *Eldon* was a bill directed expressly to the interpretation and to the execution of the trusts of this will. All parties were convened, and particularly the next of kin of the testator was a party Defendant in the cause. All persons interested, therefore, were parties to that suit, which was brought for the purpose of ascertaining how far the will was a valid disposition of the personal estate, and the argument was raised that, so far as the trust for accumulation was concerned, the will offended against the rule of perpetuities, and that therefore that portion of the will could not be carried into effect. That question was anxiously weighed by Lord *Eldon*, and it is quite impossible to suppose that when the argument was before him, and the duty also devolved upon him of considering how far the trusts were valid, it is impossible, I say, to suppose that he would have made the decree which he did make if he had entertained any doubt whatever upon the point which is made the subject of the present appeal.

Now, Lord *Eldon*, in the language of the decrees of that day, and also of the present, directed that with a particular exception the trusts of the will should be carried into effect. He declared the will to be well executed, and that the trusts thereof ought to be carried into execution except so far as the will directs accumulation. And after setting forth that portion of the will with a view to exclude it from the operation of the decree, the decree goes on to declare that the Defendant, the infant, *Horatio Francis Kingsford* (the father of this Respondent) is entitled in possession to the rents and profits of the testator's freehold and copyhold and leasehold estates, and the dividends and annual proceeds of the personal estate, for the term of his life, with remainder to the first and other sons of his body lawfully to be begotten successively, according to seniority, and so forth. The rest of the will, therefore, is, in Lord *Eldon's* opinion, as collected from that decree, clearly free from any objection to the validity of the disposition of the personalty—and it is directed to have effect given to it in the manner which I have read.

I think, therefore, seeing that that decree is now more than fifty years old (for the decree was in 1820), and seeing that the estate has been enjoyed for all that time, with reference to that

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decree, it might have been as well to arrive at the conclusion that the decree was a bar to the controversy which has now been raised. But, my Lords, as that has not been done, I am not at all unwilling to come to the question of the construction of this will in order to support what plainly, I think, appears from the decree to have been the intention and meaning of Lord *Eldon*.

My Lords, in considering the construction of the will, I have deliberately abstained from making any reference myself to, or even reading, the judgment which I delivered in the Court of Chancery in the case of *Christie v. Gosling*, and also the opinions delivered by noble and learned Lords when that case was considered upon appeal in your Lordships' House. But, considering this case without any prejudice that might have been derived from the perusal of those judgments and opinions, I have come, upon an entirely independent view of the case, to a conclusion that is in harmony with those decisions.

Your Lordships must recollect that the will begins with the creation of a life estate in the sons of the testator's daughter (there were several of those sons) and then it proceeds to give estates tail in remainder to the first and other sons of those several sons in succession. It is plain, therefore, upon the face of these dispositions, that there would be, according to the intent of the testator, and the operation of his will, several tenants in tail, taking by purchase.

With that fact borne in mind derived from the will, we come to construe the proviso which is annexed to those limitations. The first observation is that the proviso is limited to the personal estate of the testator. The proviso does not control or in any manner alter the limitations in the will of the real estate, but the proviso deals with personal estate alone. The proviso refers to persons taking the real estate under the will; and the question is whether this form of proviso, dealing with personal estate, with reference to the dispositions of real estate, can receive any other interpretation than that which limits the meaning of the proviso to a definition of tenants in tail taking by purchase under the will.

Now the meaning of the words must of course be influenced by the fact of the law upon the subject. The law upon the subject is this: that with regard to personal property, no individual can take

it by descent. In the ordinary meaning of the term real estate is taken by descent, but personal estate cannot be taken by descent. When, therefore, you refer to persons taking as tenants in tail under a will, you must of necessity limit the description to those persons only who take by purchase, for no other persons can be brought within the category, or made by law to answer the description. When, therefore, you come to construe a proviso of this nature, you must bear in mind that the tenants in tail spoken of with reference to the personal estate are such tenants in tail as take by purchase alone. And the object of the testator in a proviso of this kind is perfectly clear, it is to propel the personal estate from one tenant in tail taking by purchase, but who dies under twenty-one, to the next tenant in tail by purchase succeeding him in the order of succession prescribed by the will. It does not at all touch the enjoyment of the tenants in tail of the real estate. It leaves that where it is created by the will; but it takes the tenant in tail taking by purchase under the will, and contemplating the possibility of the first taker dying under twenty-one, it propels the estate from him to the other.

The object therefore of the proviso is in direct conflict with the argument which has been urged at the Bar, because the argument at the Bar has been this: You must neglect the proper meaning of the words, and lay aside wholly the object and intent of the proviso, and you must construe the proviso as if it were a thing applied to real estate and not to personal estate. But if it were applied to real estate you find two things required before you arrive at an absolute interest, namely, the attaining of the age of twenty-one, and also the becoming entitled in possession. The Appellants say that "entitled in possession" means the actual receipt of the rents and profits, but they say that with regard to the real estate that may not happen for an indefinite period of time, because the successive tenants in tail of the real estate succeeding one another by descent may, all of them, for a long period of time, die under the age of twenty-one years, and, therefore, without becoming entitled to the actual receipt of the rents and profits. I say, in putting that construction upon the words "in possession," you altogether forget that the proviso is limited to those taking by purchase. And you forget this also, that it is

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utterly impossible to speak, with reference to personal estate, of persons taking by inheritance in succession. And therefore you apply a difficulty to this limitation of the personal estate which is derived only from the limitations of the real estate, but to which the law forbids personal estate to be subjected. It is plain, therefore, that if you were to give to the words "in possession" the meaning contended for by the Appellants at the Bar, you would be putting upon those words a sense and an interpretation which not only contradict the object of the proviso, but would be in utter repugnancy with the rest of the directions contained in the proviso.

But now let us see whether the proviso does not bear *in gremio* evidence that it was intended to apply only to those who take by purchase, to whom alone it could be applicable, and not to those who succeeded to the real estate by descent. Now, my Lords, you will observe that the first part of the proviso declares that "such persons as shall under this my will be entitled to the estate tail in possession in my real estate" shall not be absolutely entitled—they are left entitled, but the restriction is upon their being "absolutely entitled." It is evident, therefore, that it was intended to apply to those who would be entitled under the bequest contained in the will. And the direction only is, that they shall not be absolutely entitled until they attain the age of twenty-one. Well, but is there anything here to render necessary the imposition of this farther condition, that they shall not be absolutely entitled without being also in possession of the rents and profits of the real estate? There is nothing in terms that amounts to that. Can you derive that prohibition from the words "such person or persons as shall under this my will be entitled to an estate tail in possession"? It is clear that Lord *Eldon* felt that difficulty; and as he felt it and dealt with it, it is clear (in confirmation of what I have already said) that his attention was directed to this part of the will, but he did not derive from it any conclusion that rendered it obligatory upon him to declare this portion of the will void for remoteness. It is clear, also, that he held that the words "in possession" must, in order to escape from that repugnancy which I have mentioned, receive a secondary interpretation, which probably they may easily get in connection with the trust for accumu-

lation, and that they did not amount to the imposition of a farther condition in addition to attaining the age of twenty-one, namely, the condition of their becoming entitled absolutely to the receipt of the rents and profits.

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And, my Lords, there is another conclusion which forces us I think, to come to that meaning in order to accomplish the very object of the testator. You will be good enough to recollect that in the case of a tenant in tail dying under the age of twenty-one, leaving issue, the estate is transmitted to his issue; but if you were to impose upon that tenant in tail the obligation of having actually got into possession before he had become entitled to the personal estate, the result would be the diversion of the estate. The personal estate would go one way and the real estate would go another way. And therefore you would give to those words "in possession" a meaning that would frustrate the whole object of the testator; for it would render the receipt of the rents and profits an absolute condition of the title to the leasehold and real estate; whereas there is no such condition with regard to the real estate. And the real estate would be transmitted to the son of the tenant in tail dying whilst his estate was yet in remainder, and the personal estate having been impressed with that condition would go away to somebody else. But that is not the object. Are we to construe a will containing equivocal words so as to defeat the object of the testator, or are we to give it an interpretation consistent with the object of the testator and consistent with the meaning and intent of the whole of the clause in which the words are found? It is very easy to do so. You will construe, my Lords, these words, "entitled to an estate tail in possession" as meaning that the tenant in tail shall have the *status* of being entitled to the actual pernanacy of the rents and profits of the estates if the antecedent life estate were at that time defunct. And then these words are nothing in the world more than words expressive of that which will be the consequence of attaining the age of twenty-one; that the tenant in tail will become actually entitled to the rents and profits of the estate.

Again, my Lords, it is plain from what has been called the dispositive clauses—not with much correctness, for they are not dispositive, that is left to the previous clause—but they are

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expressive of an intent that the leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one, and become, that is *and thereby* become, entitled to an estate tail in possession. Therefore the words "in possession" in the will are used only intensitively to designate and describe the tenant in tail attaining the age of twenty-one, and by attaining the age of twenty-one being in the position of being entitled to the rents and profits, if the estate for life were at that moment to determine.

I have, therefore, no doubt in recognising again, if it were necessary to do so (which it is not, after your Lordships' decision in *Christie v. Gosling* (1)), the rule laid down in *Gosling v. Gosling*, namely, that these provisions are intended to apply to tenants in tail taking by purchase. For there can be no other tenant in tail of personal estate than he who takes by purchase. I should recognise that rule and apply it, if it were *res integra*, to the interpretation of this will, and I find nothing in the equivocal words "in possession" which takes away the means and the right of applying that rule, and which obliges us to convert the whole thing from being a regular and well-ordered disposition into a perfect chaos, and to effect the destruction of the will instead of the interpretation and execution of it.

Lord *Eldon* interpreted it, and directed it to be carried into effect, I think, upon very just and right principles. Your Lordships have still farther declared and expanded those principles in your decision in *Christie v. Gosling* (1). I think those principles are strictly applicable here, and I think they cannot be thrust out of view by any meaning which can be attributed to these words, "in possession," which words must be construed by the context, and, if necessary, controlled by being made subordinate to the general intent and purpose of the testator in the whole of the will, and particularly in the clause in which these words are found. And the more so, because if you gave them other than a secondary interpretation, if you gave them the meaning which has been put upon them by the Appellants, the result would be that you would defeat the very intent of the testator in the event most likely to

(1) Law Rep. 1 H. L. 279.

happen by compelling the real estate to go one way and the personal estate to go another way.

My Lords, I am happy that you propose to dismiss this appeal without costs. It is a contest between relations. It is a contest over the words of this will. I think this farther discussion ought not to have been made upon it, but inasmuch as it is desirable that these parties should be sent away in a spirit of good feeling towards one another, I think your Lordships have followed former principles and rules quite rightly in coming to the conclusion that this appeal should be dismissed without costs.

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LORD O'HAGAN :—

My Lords, in this case the questions were originally two, and on both of them judgment was pronounced in the Court below in favour of the Respondent. But subsequent events have rendered the second no longer material, the tenant for life having died, and the Respondent being now actually in possession. This was perhaps the more difficult of the questions, and I am glad that it is no longer in controversy, although if it were I should agree with the conclusion of the noble and learned lord on the woolsack.

On the only point with which we have to deal it appears to me, in the first place, as was observed by the Vice-Chancellor, that "the intention is perfectly clear," and that we are asked to defeat that intention by reversing his decision. And, in the second place, it is to be noted that the will was manifestly prepared with great care and intelligence, and that the testator appears (as was said by Lord *Eldon* in 1820), to have quite understood the legal distinctions affecting the devolution of real and personal estate. The form of the proviso, whatever may be its legal effect, is demonstrative of this ; and it seems to me clear that the effect of its power was to prevent and qualify the operation of the doctrine which vests, absolutely and at once, leasehold and personal estates in persons who would have taken estates tail under the same terms of gift if the subject matter had been realty. So far as the will itself is concerned, if it had stood without the proviso, I apprehend there could have been no doubt that the Respondent, taking the real estates as tenant in tail, would have taken the personal estates absolutely, and that the same form of words applied to each must



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have accomplished this diverse operation. The personalty, in this case, appears to have been by far the larger part of the whole property; and the tenant in tail, getting the realty only, with limited rights and conditional succession, would at the same time have been invested with complete dominion, transmissible at his will, over that larger part. The testator appears to me to have sought to avoid this inconvenient inconsistency, as far as he could, and to have striven to do so by limiting and conditioning the right to the personalty through a referential modification of the action of the will in its regard; and not, as has been contended for the Appellant, by the making of a new gift or the extension of any right theretofore created. And this seems to be the testing query in the case: Is the proviso merely referential, qualifying and restricting, or are we to deal with it as integral and independent, and creative of a new estate, which cannot be maintained in consistency with the established doctrines of the law?

It was almost admitted that if the first clause of the proviso had stood alone, the case would not have been distinguishable from *Christie v. Gosling* (1), decided by your Lordships' House, as it appears to me, on reasonable and just considerations, preventing the defeat of a testator's plain purpose without the violation of legal principles. That first clause has a clear and intelligible meaning. The testator knew (as I have said) that the tenant in tail of the realty would under the will be "absolutely entitled to his leasehold and personal estates," at whatever age and under whatever circumstances he should become such tenant, and that there would be no restraint on the devolution of it in a course quite distinct from that in which the realty might run. He wished to apply some such restraint, to some extent at least; and it was provided accordingly that the tenant in tail should not be *absolutely* entitled until the attainment of his majority. He was to have an inchoate title, to be consummated in a certain contingency; and in this declaration the testator only cut down the large operation of the words he had used before. Certainly it would be difficult to say that the Vice-Chancellor was wrong in holding the authority of *Christie v. Gosling* (1) decisive, if the proviso had gone no farther. Can it be supposed that the testator meant to apply the words

(1) Law Rep. 1 H. L. 279.

“entitled to an estate tail” to an estate by descent or inheritance and not by purchase, at the very moment when he was making a provision which excluded the notion that such an estate tail, as distinguished from the absolute estate which he meant to qualify, existed in the chattel interests which he desired to protect?

If this be so, is not the case nearly identical with that on which the Vice-Chancellor relied, and in which, as here, the tenant in tail would have taken the entire estate in the personalty, had not his bequest been contracted by the condition that he should not have it absolutely before he reached the age of twenty-one years? If there was no unwarranted straining of construction there to carry out a manifest intention, none is needed here to attain the same good purpose.

Then, is there anything in the second clause of the proviso which should be taken to make a new estate or designate a new class of persons? I do not think there is. That clause is a mere affirmation of that which was negatively stated in the antecedent words. It only affirms that the leasehold and personal estates shall vest on the condition without the fulfilment of which those negative words declared that they should not vest at all. And I do not see that the mere change in the form of the clauses, their substance and effect remaining the same, advances the Appellant’s contention in the least; or that if we can hold, as I think we ought to hold in sustainment of the testator’s intention, that the estate tail, in the first part of the proviso, is to be taken as an estate tail by purchase, the same words, in the second part, should not receive the same qualifying interpretation. If they do, *cadit quæstio*; and there is no difficulty in this case more than existed in *Christie v. Gosling* (1) with reference to any invasion of the law against perpetuity. The words of Lord *Cranworth* in that case (2) seem strictly applicable here. “The object was to restrict and narrow the class who, but for the proviso, would have taken absolutely; not to let in any class of persons who, if there had been no proviso, would have taken nothing.”

I do not think that we depart from any sound rule of construction, or force unduly the language of the testator in aid of the presumed intention, when we hold that, acting with a clear concep-

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tion of his own purpose, and an intelligent apprehension of legal distinctions, he employed words quite capable of carrying out his views. If he had introduced the phrase "by purchase" into the proviso, as pointing to the particular tenants in tail who should not take the absolute interest which he designed to qualify, no question would have arisen. And does not the law implicitly insert those words making the provision sensible and operative, which, without them, regard being had to the nature of that interest, would have been without relevancy or effect? He meant clearly to affect tenants in tail capable of taking the personalty; and they could only be tenants in tail taking by purchase. We have been pressed by the consideration that, Lord *Eldon* having declared the trusts for accumulation illegal and void, the proviso making the leasehold and personal estates subject to the trusts "hereinbefore declared" is altogether vitiated on that account; but we must remember that there are other trusts quite legal and unimpeachable, and it would be too much to avoid a proviso simply because of its reference to trusts generally, several of which are good, even though one be bad.

After the full discussion the matter has received, I shall not further trouble your Lordships save by saying that I am glad this salutary doctrine, established by the House in *Christie v. Gosling* (1), has been found substantially applicable to this case, and enables us by its application to avoid the defeat of the purpose of this testator. I think the judgment of the Vice-Chancellor should be affirmed. But, for the reasons which have been given by the noble and learned lords who have addressed your Lordships, I am of opinion that, although the decree of the Court below should be affirmed, it should be without costs.

*Decree affirmed; appeal dismissed; costs of the appeal to be paid out of testator's personal estate.*

*Lords' Journals, 19th April, 1872.*

Solicitors for the Appellant: *Wynne & Son.*

Solicitors for the Respondent: *Field, Roscoe, Field, & Francis.*

THOMAS TANHAM . . . . . PLAINTIFF IN ERROR;

AND

JOHN ARMITAGE NICHOLSON . DEFENDANT IN ERROR.

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April 29.

*Ejectment—Notice to Quit—Servant—Agent.*

The service of a notice to quit made at the house of the tenant upon a person whose duty it would be to deliver the notice to the tenant, is sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant.

The presumption in such a case is that it did reach the tenant himself.

In such a case the question is not whether the servant performed his duty in delivering it to his master, but whether the servant was to be considered as the agent of the master to receive the notice. If he was, the service of the notice will effectually bind the master.

*Per* THE LORD CHANCELLOR (Lord *Hatherley*):—The fact that the agent who received the notice destroyed it would liberate entirely the person who delivered the notice, but would not liberate the person whose agent had received and destroyed it.

*Per* LORD WESTBURY:—Where there has been service of a notice to quit left at the tenant's house with a servant of the tenant, such a fact is more than presumptive evidence of a service on the tenant. The landlord's right would otherwise be controlled by something to which the landlord was an utter stranger.

*Per* LORD WESTBURY:—But even if only presumptive evidence of the service, the evidence to rebut it must be proof of the fact that the notice did not come to the knowledge of the tenant at all.

*T.* lived in a house where his two sons and his daughter also resided. *T.* was imbecile. The house was managed by his daughter, the farming business by his two sons. A notice to quit, addressed to the father, was served at the house by delivery to the daughter. She put it on the dresser in the kitchen, and afterwards burnt it. One of the sons knew of its existence, but was not shewn to have known its exact terms, though he was aware of its nature:—

*Held*, that this was a service sufficient to entitle the landlord to maintain ejectment against the father.

THIS was a proceeding in Error on a judgment of the Court of Exchequer Chamber in *Ireland*, which had reversed a previous judgment of the Court of Queen's Bench in *Ireland* (1).

*Nicholson* brought an ejectment on title against *Thomas Tanham*, for lands situate in the barony of *Upper Kells*, in the county of

(1) 4 Ir. Law Rep. Com. Law, 185.



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*Westmeath.* The cause was tried before Mr. Justice *Lawson*, at the Summer Assizes at *Trim*, in 1869. The Plaintiff claimed as landlord under a conveyance from the Landed Estates Court. The Defendant was the tenant from year to year of between nine and ten acres of land; and the only real question in the case was as to the sufficiency of the service of the notice to quit. The notice was dated on the 10th of April, 1868, and required the tenant to quit "at the end of the year of your tenancy which shall expire next after the end of half a year from the time of your being served with this notice." *Byrne*, the Plaintiff's bailiff, swore that he had "delivered the notice to the daughter, at the house of her father, on the lands."

At the close of the Plaintiff's case the Defendant's counsel asked for a nonsuit on these grounds—that there had been no proper service of the notice to quit; that *Thomas Tanham* was *non compos*, and could have no agent; and that when the notice was delivered to the daughter there was no explanation of it given to her. His Lordship refused to nonsuit, and witnesses were then called for the defence. *Rosa Tanham*, the daughter, said she had received a paper from the bailiff. She did not read it. He asked her how her father was, and she said "quite innocent" (which was explained to mean imbecile). She threw the paper on the dresser and afterwards burned it. Her two brothers managed the farm. She thought they saw the paper. They were both in the house. They could read. *Patrick Tanham*, the eldest son, thought he had never seen the paper. His brother *Tom* told him of it, and said, "We got the notice to quit." *Thomas Tanham* had never spoken to his father about the paper; the father knew nothing of it. The learned Judge again refused to nonsuit, but said he would leave to the jury the question, "Whether, in fact, the notice to quit ever reached *Thomas Tanham*, or became known to him?" The jury found in the negative. His Lordship, however, thinking the service of the notice sufficient in law, directed a verdict to be entered for the Plaintiff, subject to leave to move the Court for a new trial, or to enter the verdict for the Defendant. A rule was obtained and was made absolute for a new trial. On Error to the Exchequer Chamber the decision was reversed. The case was then brought up to this House on Error.

Mr. *Isaac Butt*, Q.C., and Mr. *Patrick Martin* (both of the Irish Bar), for the Plaintiff in Error :—

There was here no sufficient service of the notice to quit. It may be assumed, for the purpose of this argument, that the tenant was living in the house where the notice was served, and that the house was part of the demised premises. These two facts are no doubt important, but much more is required to constitute a good service of a notice to quit, so as to entitle a Plaintiff to proceed in ejectment. The law requires that a notice shall be brought to the actual knowledge of the person against whom it is to be used. If the notice is not given to the person himself it must be shewn to have reached his hands, so that he was aware of its being given, or it cannot be said to be a notice. If there is a recognised agent of that person, notice clearly given to the agent will of course bind the principal. Short of this there can be nothing which deserves the character of notice. Here there was no notice to the tenant himself, nor was there any agent qualified and entitled to receive notice, so as to bind the tenant. It is true that in *Jones d. Griffiths v. Marsh* (1) Lord *Kenyon* said that personal service was not necessary ; but his observation is to be interpreted by what Mr. Justice *Buller* intimated in the same case, that service not personal only raised a presumption, and that the servant, on whom the notice was served, not being called to shew that it did not reach the master, the presumption would be that it did so. That shewed that service on some one else was only *primâ facie* evidence of notice, which might be rebutted, and which ought to be substantiated, and that whether it reached the party or not was an inference of fact, and consequently was something that became the subject of evidence and ought to be left as a question of fact to the jury. In *Doe d. Buross v. Lucas* (2) Lord *Ellenborough* put that interpretation on the previous case, and there being in the case before him no evidence that the notice did reach the master, he held the alleged service to be insufficient. In the present case no evidence of that kind was offered. All the evidence that was received went to shew that the notice could not and did not reach the tenant's hand, for *Rosa Tanham* swore that she never gave the notice to her father, and that he knew nothing whatever of it. *Doe d. Neville v. Dunbar* (3) shews

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(1) 4 T. R. 464.

(2) 5 Esp. 153.

(3) Mood. & M. 10.

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that what has been done here is not sufficient, for there, though late, the notice did reach the tenant himself, and so was held sufficient. Where the tenant is absent from the premises a different question would arise, and there must be some person who could, as the tenant's agent, receive the notice in his absence. [THE LORD CHANCELLOR:—Suppose the tenant was *in extremis*.] Then it would be for the Judge to say whether what had been done was sufficient to satisfy the requisitions of the law, and to leave the facts to the jury. There might be cases in which that would be the proper course to pursue: *Doe d. The Commissioners of Education v. McLaughlin* (1), where the decision really went on the ground that, in fact, the notice did come to the tenant's hands. In *Smith v. Clark* (2) the service was held sufficient, but there it was served on the wife at the house of the husband, and the nature of it was explained to her. There was no explanation of it here. In *Alford v. Vickory* (3) it was held that a notice must at least be shewn to have come to the hands of the tenant before the expiration of the period mentioned in it. Here there was not any evidence of that kind. [THE LORD CHANCELLOR:—Your argument would come to this, that there must always be personal service.] If personal service could be had that would be the best, but when that was not possible it should be shewn that the notice came to the hands of the intended person. *Papillon v. Brunton* (4) was not opposed to this argument, for that was a mere question whether the notice, which undoubtedly came to the hands of the agent, had reached him in proper time.

Of course where there were several tenants in common, all having the same interest, and one alone lived on the premises, service on him would be sufficient, for service on all might be impossible; and the proper presumption would arise there that the knowledge of it had reached all. But in all cases where the tenant could be personally served personal service was required: *Adams on Ejectment* (5); *Furlong on Landlord and Tenant* (6).

These were cases that directly bore on tenancies. In cases of a different kind a similar rule prevailed. Thus, in an action for an

(1) 1 Fox & Sm. 60.

(2) 9 Dowl. Prac. Cas. 202.

(3) Car. & M. 280.

(4) 5 H. & N. 518.

(5) Page 94.

(6) 2nd Edit. p. 621.

attorney's bill, service of the bill on a servant at the house of the Defendant was treated as equivalent to service on the Defendant himself: *Macgregor v. Keily* (1); but only because the servant might have been called to shew that he had not delivered it to his master. [LORD WESTBURY:—Did not this notice reach the daughter, an acknowledged agent of the father?] It ought to have reached his hands. This case ought to be decided independently of presumption. There was nothing to shew that the daughter was an agent of the father. [LORD WESTBURY:—And the brothers? It certainly reached the hands of one of them.] There can be no presumption on that point. The facts displace it. There was no service on the son; there is only a presumption that he knew of the notice. But, even assuming the son to have known of it, can a service on the son in any way whatever be sufficient to put an end to the tenancy of the father. It is clear that the father had not appointed the son his agent—there is no evidence to shew that he had—there is evidence to shew that the father could not have appointed him, for the father was imbecile. [LORD WESTBURY:—In law the question is, whether the notice came to the knowledge of the tenant. The presumption under such circumstances as exist here, is that it did. You are bound to shew that it did not.] The Judge left it to the jury to say whether the notice reached the hand of the tenant, and the jury said that it did not. Yet the Judge directed the verdict to be entered for the Plaintiff. That was erroneous. The daughter directly contradicted the presumption that she might have delivered the notice to her father, for she said she had thrown it on the dresser, and she afterwards burnt it. [THE LORD CHANCELLOR:—Would the misconduct of the servant be an answer in such a case?] It would; at all events where the servant was only impliedly and by inference, and not really, filling the character of an agent. Perhaps, too, the daughter could not read, and did not understand the notice. And there was no proof here, as in some of the cases, that it was explained to her. In all other cases a notice must reach the hands of the person to be affected by it. In *The British and American Telegraph Company v. Colson* (2) the Defendant had applied for shares. A notice of allotment of shares was sent to him by post. He gave evidence that

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(1) 3 Ex. 794.

(2) Law Rep. 6 Ex. 108.



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he had never received the notice, and he was held not to be bound by it. So in *Reidpath's Case* (1) it was held that the mere posting of an allotment of shares to an applicant at his proper address, was not such a communication of the allotment as to be binding on him.

All the cases establish the principle that where a notice is required to be given, proof that the party himself received it, or that it was received by his duly appointed agent, must be produced.

Sir *R. Palmer*, Q.C., and Mr. *Battersby*, Q.C., and Mr. *O'Driscoll* (the last two gentlemen were of the Irish Bar), were for the Defendant in Error:—

There is no such rule as that a notice to sustain an ejectment must be personally served on the tenant. In *Doe d. Neville v. Dunbar* (2), Lord Chief Justice *Abbott* held that such a service as was proved here was absolutely sufficient. In some cases personal service of a notice or proof of actual knowledge of it would be impossible, as for instance, where the tenant lived abroad. In general, service at the house itself is sufficient. But here the sons and daughter were the agents of the father; there was no necessity for him formally to confer that character on them—they were so by the force of circumstances—they were in fact the persons managing the house and farm for him, he being incapable of managing either for himself. Under such circumstances the service on the daughter at the house where her father resided was amply sufficient. Personal service is not required except when a person is to be made criminally responsible. And, as to the objection that the father here was an imbecile, in *Mellersh v. Keen* (3) a notice to dissolve a partnership given to the lunatic partner was held sufficient, the Master of the Rolls there founding himself upon *Robertson v. Lockie* (4), where the same rule had been applied, and his Lordship in reviewing the principles which related to giving notice, expressly referred to a notice to quit as an instance where such a service as occurred here would be sufficient. The cases referred to on the other side as to notices of allotments of shares really strengthen this argument.

Mr. *Butt* replied.

(1) Law Rep. 11 Eq. 86.

(2) Moo. & M. 10.

(3) 27 Beav. 236-241.

(4) 15 Sim. 285.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, we have, I believe all of us, felt it only to be due to the respect which we must feel for judgments of the Court of Queen's Bench and of the Court of Exchequer Chamber in *Ireland*, to hear this case fully argued and discussed, and we have had the great advantage of hearing it most ably discussed and most fairly put before us by the learned counsel who has addressed us on behalf of the Appellant. I think he did not in any way overstate his case, or the line of authorities to which he referred in support of his case. But it appears to me that he has entirely failed to establish as the result of those authorities that the direction given by the learned Judge who tried this case was a wrong one, or that the conclusion at which the jury, under that direction, arrived was a wrong one.

The sole question in the case is an extremely short one, and it is simply this, whether or not the delivery of a notice to quit on one who, undoubtedly, according to the evidence, was a servant of the tenant, at the house of the tenant, that house being on the demised property, is to be taken as a good and effectual service of that notice, so as to subject the person to whom it is addressed to the consequence of being ejected upon the termination of the notice.

The line of argument which Mr. *Butt* has taken, which is a very ingenious one, is this: I will first show you, he says, that the service of a notice to quit upon the servant living at a dwelling-house, although by law it is a service that may be established to be in itself a good service, is nevertheless not conclusively established as a good service if one of two things occurs, namely, if either the Defendant, having had service of such a notice as this, proved by the service upon his servant, produces that servant and shews by the evidence given by that servant that the notice never reached him; or if he is able to displace the fact of that servant being a person who would be authorized in law to receive a notice of this description.

Now, with regard to the servant being a person who would be authorized in law to receive such notice, I think Mr. *Butt* conceded at once that a servant of a tenant living at the house upon the property demised would be a proper agent for the purpose of

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receiving a notice of this description. But he said it would only be a *prima facie* case, raising a presumption, and a strong presumption, as he said, that the notice reached the employer. And for this he cited some passages, first in an old case before Lord *Kenyon*, in which Mr. Justice *Buller* is supposed to have thrown out some expressions of that description; and in another and later case where Lord *Ellenborough* is supposed to have differed from the previous decision. And Mr. *Butt's* argument was this, that Mr. Justice *Buller* in the first case, and Lord *Ellenborough* in the next, said: True it is that the presumption of the service of the notice being a proper service upon the tenant, arising from the relation which exists between him and his servant, is a presumption of the strongest character—it will bind effectually unless rebutted by counter evidence. But the reason given by Mr. Justice *Buller* in the one case, and by other Judges in other cases, amounts merely to this; that it is competent to the person sought to be bound by the notice to call the servant, if he thinks he can in any way explain the nature of the case, and shew *de facto* that the notice never reached him. I asked Mr. *Butt*, in the course of his reply, whether any case in which there had been such counter evidence could be cited in argument, in which any such defence had been attempted and succeeded, and he candidly said he could not produce one. I was not surprised at that, because I apprehend that the real point in the case, when you come to consider it, is this; not whether or not the person you have constituted your agent, by your line of conduct, to receive any document that may be left at your house, has performed that which is his or her duty, but whether or not you have constituted that person your agent. Because, if once you have constituted your servant your agent for the purpose of receiving such a notice, the question of fact as to whether that servant has performed his duty or not, is not one which is any longer in controversy. When once you constitute your servant your agent for that general purpose, service on that agent is service on you—he represents you for that purpose—he is your *alter ego*, and service upon him becomes an effective service upon yourself.

I apprehend, therefore, that when the law has said, as it has done in repeated cases, that, for this purpose, the effective service of notice

upon a servant at the dwelling-house situated upon the demised property is a service upon the tenant, it has proceeded upon this ground, that the law considers that servant to be an implied agent of the tenant for that particular purpose. The only evidence by which that could be rebutted would be by your producing such evidence as you might be able to produce, to shew that such an implied agency being only an implied agency was not correctly implied, and that the inference of agency was not correctly drawn from the facts proved in the case, and that consequently there was no agency. But the agency being once admitted, it is beyond all legitimate inquiry to go into the question whether the person whom you constituted your agent did or did not fail in his duty towards you. The question is, whether the other person was entitled to consider that he was dealing with you in everything that he did with the agent. Therefore the fact that the agent who received the notice put it into the fire would liberate entirely the person who delivered the notice, but it would not liberate the receiver of the notice when once the agency was established, it would not avail him as a mode of escaping from the consequences of his having employed such an agent.

My Lords, this individual case is really extremely simple. It does not rest upon the ordinary case of a servant residing at a house situated upon the demised property—but the facts are remarkably strong in this, that not only were there two brothers (I do not, however, think it is very important to enter into that part of the case about them)—that is not the stress of the case—the stress of the case is as to what the woman was; the woman for every intent and purpose seems to me to be peculiarly in the position of a servant of the tenant for this particular object. Because what does she say herself? She says that her father was in a weak condition of mind, and had been so for a long time. She says that she knew *Byrne* the bailiff, she says she saw him, and that she knew perfectly well who he was, she describes him in her evidence, and says: This was the bailiff of the landlord and he came to me. I will read her own words—she says, “I am the daughter of *Thomas Tanham*, he died on the 26th of May, 1868, he was very old and foolish for eight years before his death. *Tom* and *Patrick* my brothers, managed the farm; *Byrne* the bailiff”—that is the

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person who served the notice for the landlord : she speaks of him as knowing perfectly well who and what he was—she says “*Byrne* the bailiff gave me a paper, I did not read it.” She does not say that she could not read it, but she only says that she did not read it. “He handed it to me and asked me how my father was? I told him he was quite innocent. I threw the paper on the dresser and afterwards burned it. I did not tell my father anything about it.” Then *Byrne*, the bailiff, himself proves the delivery of this paper, and proves what it was, that it was a notice addressed to the father, who was the tenant, and that he handed this notice, so addressed to the father, to that woman, the daughter, who received it and afterwards dealt with it as she has described.

Then in cross-examination the daughter says this: “We all took care of my father and managed the farm.” She herself is put there certainly in the capacity of serving her father in the matter of this very farm business. She takes care of him, and if ever there was a servant who was authorized to receive letters for a person residing on the property, and letters connected with the management of that property, certainly this daughter seems to have been so. She was peculiarly situated as the agent of her father, because she was not only so in the ordinary sense of a servant of her father, but she was so in the peculiar circumstances of his being in a weak state of mind, and her taking care of her father and managing the house. Now what more does she say about it? She did not know what it was, she had no doubt of its being addressed to her father, and she knows that it is delivered by the bailiff, and she says that the paper was “two or three times upon the dresser.” That was explained by the learned Judge as meaning two or three hours. It was a slip in the witness’s language.

A little farther on your Lordships will find this, that the two brothers managed the farm, and what happened with regard to this piece of paper was this. The next witness, *Patrick Tanham*, says, “My father was foolish for nine or ten years.” He says “I never saw the notice to quit, it had been burnt before, that is before I saw it, no one told my father of it. I paid the rent to Mr. *Nicholson* regularly,” that is the landlord. Then he is cross-examined, and he says “I think I did not see the notice; *Tom* spoke to me of it. He can read, and said ‘We got the notice to quit.’” I

think, therefore, it is very plain that *Thomas* saw it before it was burned, and it was burned within two or three hours after it was received. He had such a knowledge of this instrument as to be able to say that it was a notice to quit, and it is not until then that it is thrown into the fire.

Now I think we have here every possible element found in the case to constitute a complete case of agency on the part of the servant as a person qualified to receive a document of this description. You have a woman living with her father, who is in a state of mind requiring assistance. You have it proved that she took care of him, and performed all her duties towards him as managing and taking care of him in the house; and as it regarded the business, she says: "We managed the farm." Whatever possible state of circumstances are required to complete the evidence of agency is proved here. There are numerous cases of persons being considered agents for the purpose of receiving notices of this description. I think the circumstance that the meaning of the notice was not declared to her might be a matter to go to the jury, and it might be a subject of comment before the jury, whether she had or had not fulfilled what it was her duty to do. But in this state of evidence your Lordships cannot doubt that she knew that she had received the document—which document we have it in evidence she knew was addressed to her father—that she knew that she had received it from the landlord's agent; and though she never read it she does not say that she did not perfectly well know the purport of it. And we find from the brother that his brother did read it and knew what it was, and he knew that he had got a notice to quit. In this state of things it seems to me that that which was proved afterwards to the satisfaction of the jury, and which no doubt was true, that the old man was not told of it, and that the document was thrown into the fire—in order, of course, that he might know nothing about it—I say all that is nothing to the purpose; you have the thing brought home to the agent of the person, and having brought it home to the agent, who in this case is the daughter who received this paper, you have brought it home to the tenant himself; and the tenant himself cannot be discharged from the consequences of that notice by the agent taking upon herself to withdraw the notice from his know-

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ledge, by destroying it; it was known to the sons, who also acted as agents in the management of the farm, and that is the only observation I would make upon that part of the case. These persons who acted in the management of the farm evidently took care that the father should not know of this information which had reached them, and which being undoubtedly unsatisfactory to them they thought would be equally unsatisfactory to their father, and they therefore took care that he should not see the notice. Now, if we were to hold in this case that the notice to quit has failed in its effect because it has not reached the party's own hands, we should be laying down a new rule of law which has never been laid down before, namely, that it is absolutely necessary that the document should be brought to the person's own personal knowledge, when there was one who was constituted an agent, and whose duty it was to give him that information. I say if we were to hold that, the consequence would be that the dealing with agents in every case would be reduced to a very perilous question indeed, namely, of always depending upon whether the agent had done his duty, and not merely upon whether or not he or she was the agent. We have only one question before us, namely, whether this woman was an agent of the tenant or not, and it being established that she was an agent, we have no need to inquire whether she did her duty as such or not—that is wholly immaterial to the question.

I submit to your Lordships that the judgment complained of in this case ought to be affirmed, and the appeal dismissed with costs.

LORD WESTBURY:—

My Lords, I entirely concur in the observation of my noble and learned friend, that this case has been argued with great ability, and with great fairness and candour. I agree also that though the matter in dispute is small, the case is one of very general interest, and may be regarded as a species of representative case, and therefore I think, having regard to the difference of opinion in the Court below, it was properly brought by way of appeal to your Lordships' bar.

Now the first observation I would make on the matter is this, that the alleged senility, childishness, and want of intellectual capacity on the part of the father must be entirely laid out of con-

sideration. There is no fact found which is legally sufficient to enable this tribunal to say that the father was in a state of entire legal incapacity. We must reason, therefore, on the assumption that the father was capable of understanding the subject matter.

I regret very much to find that the law is in the state in which it is with regard to the service of notices to quit as between landlord and tenant. Undoubtedly landlords stand in a situation of peculiar difficulty if those things are established by law which the Judges in the Court of Queen's Bench in Ireland appear here to have thought to be established; and if the landlord is bound by the view of the matter which they apprehended ought to prevail. If the landlord has once done that which the law throws upon him the obligation to do, his rights consequent upon having performed that legal duty ought not to be affected in any manner whatever by that which is done by his antagonist, upon whom the notice has been served. It would be an idle thing to say that a landlord serving a notice in due manner according to law, is to be deprived of the benefit of what he has done by the wilful act of the servant of the tenant, or by the incapacity of that servant, or by any accident that may befall the notice after it has been received in the dwelling-house of the tenant on whom it was served. And there is no trace of anything of that kind in the earlier cases that have been referred to. In the original case of *Jones v. Marsh*, Lord *Kenyon* lays it down as beyond the possibility of dispute that in every case the service of a notice by leaving it at the dwelling-house of the tenant has always been deemed sufficient. But he qualifies that by explaining that he speaks of notices affecting property, as notices to quit, and not those notices which are intended to bring an individual within personal contempt. Those may require personal service. The other, the ordinary civil notice (if I may so call it) is abundantly satisfied if it be left at the dwelling-house of the party. In like manner Lord Chief Justice *Abbott* says:—"I have no doubt of the absolute sufficiency of the notice. So far as the landlord is concerned, the duty has been absolutely discharged." Well, then, there appears to have crept into the judgments given by some other Judges this suggestion—that the notice, when served at the dwelling-house and received by the servant of the tenant, is *prima facie* evidence of a service on the master; and instead of its being

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held, in the language of Lord Chief Justice *Abbott*, that the service was absolutely sufficient, it has been supposed that the delivery of the notice to the servant may only be presumptive evidence of the delivery to the master. But inasmuch as the words speaking of this presumption were loosely used (I think very improperly) the notion grew up that it was competent to meet that evidence by counter testimony, and to prove that the notice never reached the master. As a consequence you would control the landlord's right by evidence of something that the landlord was an utter stranger to, with which he had nothing whatever to do, and of which it would be impossible for him to know anything.

Now I quite agree with some of the language of Mr. Baron *Parke* in that case, in which he says that the servant is not an agent to receive a bill of costs. No, certainly not; if you have to deliver a bill of costs to a party to bring him within the summary remedy given by the statute, the service of a bill of costs on that servant would not be good. But that is a personal matter, which is wholly different, in the nature of things (as Lord *Kenyon* and Chief Justice *Abbott* point out) from a notice to quit served on the demised premises, being left at the house, which is part of the demised premises, where the tenant is actually residing at the time.

I shall be glad, therefore, if we can relieve the law from a degree of uncertainty and doubt brought into it, contrary to all principle, and if we can, in justice to the landlord, relieve him from having an act done by him, which act satisfies the obligation of the law, nullified and rendered of no effect by circumstances which have happened altogether after the delivery of his notice, and in the house of the tenant or under the control of the tenant, with which the landlord has no concern whatever.

Well, now my Lords, let me take it up on the lower ground, namely, that the service of the notice in the dwelling-house, by delivery to the servant of the tenant residing there, is *primâ facie* evidence of service. Well, then, it is *primâ facie* evidence which will remain good and valid until it is overborne by counter-evidence on the other side. Now what is it that that counter-evidence must be directed to? It is, according to the lower view of which I am speaking, evidence from which you may presume that notice of the thing done reached the tenant. The counter-evidence must there-

fore be proof that it did not come to the tenant's knowledge at all. Now let us see whether that is an inference of fact which can at all be drawn from the circumstances given in evidence by this Defendant to overrule and repel the *primâ facie* conclusion of the law in this case. What does the tenant say? His servant, the agent who received the notice, is called to prove that she put the notice on the dresser of the room when she received it, that it remained there several hours—two or three hours—and that whilst it was there one of her brothers came in and read it, and that on his reading it the fact that it was a notice to quit became known to the members of the family. Now the members of the family appear to have been only three—this young woman herself, the brother who read the notice, and the other brother who acted with him in the management of their father's property. Their position is very forcibly described by the witnesses themselves, who say that the two brothers were in reality one master.

Now from this fact of the notoriety of the notice in the house, ought we not undoubtedly to draw the inference that the master of the house became aware and received information of that which all those about him knew, and which they would be naturally anxious, as, indeed, it was their duty to do, to communicate to the master of the house? It is impossible to derive from these circumstances the conclusion that the presumption of the notice having come to the knowledge of the tenant is rebutted. How can you infer that it did not come to the knowledge of the tenant when all those around him, those who acted for him and managed his affairs, became aware of the fact that the notice had been delivered at the house?

It is not a question as to the position in which the sons stand to the father. It is not necessary for the Plaintiff to shew that the sons were the recognised agents of the father. That would put it in quite a different light; because, then, if the notice came to the hands of the agent it came to the hands of the principal. But what we are considering is this—if the service of the notice at the dwelling-house be in law only *primâ facie* evidence of delivery to the master, then it is necessary for the person who is concerned to prove the insufficiency of that notice, to prove that in fact the notice did not come to the knowledge of the tenant. Well, then,

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the course adopted here is to bring forward circumstances which, if they prove anything, prove this, that there are grounds from which every man of common sense would infer that the tenant, the master himself, became aware of that which was notorious in his house, and which was known to the whole of his family and the persons about him who were concerned in the management of his affairs.

Then, my Lords, comes the only difficulty—as to the course that was pursued at the trial. In reality I think there was no obligation on the learned Judge to leave the question to the jury as he is represented to have done. I think it is plain that, on the facts, no question arose for the jury to determine. And when it was left to the jury, and when the jury returned a verdict that the matter was not known to the father, or that it did not personally reach the father, nor was the notice personally given to him, I think it is abundantly clear on the facts, as they are stated in evidence, that that was a conclusion so utterly unwarranted by the facts of the Defendant's own case, that it was in point of fact a thing which ought not to have stood in the way of judgment being entered for the Plaintiff.

On all these grounds, my Lords, although I think the matter is left, by certain expressions used in former decisions, in a state of some embarrassment, from which I hope the judgment of your Lordships may tend to relieve cases of this kind in future, I am clearly of opinion that the notice was well served, that the *prima facie* conclusion of law was not met or repelled in any way, and that it is absolutely essential to hold, under the facts proved, that in law the tenant had knowledge of the subject of the notice. And that, therefore, if it were open to contradiction, on the ground that it might be proved that the tenant had not knowledge of the notice, that proof has not been given, but the contrary conclusion has been in fact established. The appeal must be dismissed, and of course it must be dismissed with costs.

LORD COLONSAY:—

My Lords, I am also of opinion that this notice was validly served. It is held in law that notice given to the servant of the party residing in the house is a service of notice on the master;

and I think that rule or presumption of law is peculiarly strong in a case where the circumstances are such as are disclosed here. And as the notice here was given to the servant, who happened also to be the daughter of the party, especially seeing the condition in point of health in which the father was, I think the notice must be held, if there is nothing to rebut that condition of things, to have been well served.

Well, then, an attempt is made to rebut that and to make out that the person to whom this notice was given was not an agent, not a person who is held in law to be a proper recipient of a notice of that description. Now, I do not think the evidence brought forward was sufficient to rebut the presumption, even if the question was in a condition in which it could be rebutted. The evidence only went to this: These persons said that they did not communicate directly with the tenant himself about the notice. I do not think that will do. There is no statement of any circumstances sufficient to rebut the legal inference that the person to whom the notice was given, standing to the party in the relation of servant, was not a legal agent to receive that notice. If we look to what is said in the evidence for the Defendant, it confirms that position. For it appears that the tenant himself was in a weak condition, and that the daughter and the sons took care of him and managed for him—in short, that he committed himself to them—and, therefore, if you look to that evidence it is rather evidence in confirmation of the legal presumption than against it. On these grounds I think the Judge did perfectly right in holding that the notice was sufficient.

I have farther to observe in regard to the course of this case that it would be endless if every particular circumstance were to be made the subject of a particular finding by the jury. Both parties seem to have raised before the jury this broad question: One party said that the notice was rightly served, and that the Judge ought to direct to that effect. The other party said that the notice was not rightly served, and that the Judge ought so to direct. These were the broad questions which the Judge was asked to deal with—and the Judge dealt with them by telling the jury that the notice was rightly served. I think, on the grounds I have already stated, that he could not have done otherwise. I

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think there are no grounds in law on which this notice can be considered as not rightly served. And I am, therefore, of opinion that the appeal must be dismissed with costs.

*Order of the Court of Exchequer Chamber in Ireland affirmed, and appeal dismissed with costs.*

*Lords' Journals, 29th April, 1872.*

Agents for the Plaintiff in Error: *Simson & Wakeford, for T. R. Lynch, Dublin.*

Agents for the Defendant in Error: *Martin & Leslie, for E. J. Smith, Dublin.*

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LAURENCE LATTER . . . . . PLAINTIFF IN ERROR;

AND

ALFRED WHITE . . . . . DEFENDANT IN ERROR.

*Bankruptcy—Composition Deed—Detinue—Stakeholder.*

Where a deed of composition with creditors has been executed, under the terms of which certain persons, constituted trustees under the deed, are in possession of the promissory notes given to satisfy the amount agreed on as the composition, such trustees are, as between the parties to the deed, stakeholders, and are not the servants either of the persons who gave the notes or of the persons who, under the provisions of the deed, would be entitled to receive them.

If, therefore, the person who made the notes, and handed them over to the trustees to deal with them under the deed, should afterwards give notice to the trustees not to hand them over to a particular creditor, the creditor cannot maintain *detinue* against such person, the notes not being in his possession either really or constructively.

*W. A. W.* was in difficulties. A composition with his creditors was proposed, and was agreed to by them. By the deed of composition *W. A. W.* and his father were to give promissory notes for the composition. *L.*, a creditor, signed the deed, but on the next day wrote (through his attorneys) to say that he had discovered the balance-sheet presented to the creditors to be incorrect, and he withdrew his assent to the deed. The deed was duly registered under the *Bankruptcy Act* of 1861, and the promissory notes made, but *L.* refused to receive them. He afterwards brought an action against *W. A. W.* for the original debt, to which the deed was pleaded as an answer. *L.* replied that it had been obtained by fraud. The cause was referred to arbitration, and after it had been referred *W. A. W.* withdrew from the reference, and the award

was made in favour of *L.* Nothing was done on the award, but some time afterwards *L.* demanded from the trustees the notes which had been made for his share of the composition. The trustees (acting upon a notice received from the father) refused to deliver up the notes. *L.* thereon brought *detinue* against the father. This action was also referred, and on a case setting forth these facts (but which did not reserve to the Court liberty to draw inferences), the Court of Queen's Bench gave judgment for *L.* This judgment was reversed in the Exchequer Chamber. On appeal to this House:—

*Held*, that the action was not maintainable; that whether the deed was invalid or not could not on this case be determined by the House; that the Plaintiff's proper remedy was by application to the Court of Bankruptcy, which had power to do complete justice between the parties; and this House, therefore, while affirming, with costs, the judgment of the Court below, expressly reserved to the Plaintiff the liberty to apply to the Court of Bankruptcy.

*Per* THE LORD CHANCELLOR:—The 32nd section of the 17 & 18 Vict. c. 125, merely gives to the Court of Error the power to correct inferences wrongly drawn by the Court below; but where the Court below had no power to draw them, the Court of Error is in the same position.

THIS was a proceeding in Error brought against a decision of the Court of Exchequer Chamber, which had reversed a previous decision of the Court of Queen's Bench (1).

In April, 1869, *Latter* brought *detinue* against *Alfred White*, alleging in the declaration that *White* detained from him certain promissory notes, and also that *White* had, on the 29th of November, 1867, made three promissory notes, overdue, for three different sums of money, and payable at three different dates as therein specified. The declaration also contained counts for the amount of the notes and the common money counts.

The Defendant pleaded several special pleas, the sixth of which stated in substance (2) that one *William A. White* was indebted to the Plaintiff and other creditors in a large sum of money, and being unable to pay them in full offered a composition of 10s. in the pound; and the Defendant, at the request of the Plaintiff and the other creditors, agreed to become surety for the payment of the composition; that a deed was drawn up by which *John Green* and *Henry Cutler* were appointed trustees; that the composition was to be paid by three several instalments, payment thereof being secured by promissory notes of the debtor, and which notes

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(1) Law Rep. 5 Q. B. 622; 6 Q. B. 474.

(2) The pleadings are fully set out in the reports in the Courts below.

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the Defendant agreed to sign as surety, and which were to be, seven days after the registration of the deed in the Court of Bankruptcy, delivered to the trustees and held by them to deliver to the creditors respectively who should apply for the same; that the deed was registered and the notes were delivered to the trustees, who still held them; that the Plaintiff would not execute the deed or accept the notes made in his favour, but brought an action against *William A. White* for the original debt; that *William A. White* pleaded the deed, but that the Plaintiff obtained a verdict against him, the deed being bad and not binding on dissenting creditors, and that afterwards *William A. White* was declared bankrupt.

The Plaintiff, besides demurring to the sixth plea, replied that by the deed though the Defendant was only a surety as between himself and the principal debtor he was to be deemed a principal debtor as to the notes, and so could not be discharged by any arrangement which would have the effect of discharging him if he was only a surety. This replication was demurred to.

The cause came on for trial at the *Kent* Summer Assizes, in 1869, when it was referred to a barrister to state the facts in a special Case. The Case set forth the facts already stated, and also that it was part of the arrangement that the assets of *William A. White* should be realized by his father *Alfred White* (the now Defendant in Error) and handed to him. On the 16th of December, 1867, the Plaintiff executed a deed in conformity with this arrangement, but on the following day his attorneys wrote to say that the Plaintiff had discovered that the statement of accounts in the balance-sheet laid before the creditors was incorrect, and that he therefore withdrew his assent to the deed, declined to be bound by it, and intended to take proceedings for the recovery of his debt. The answer of *White's* attorneys was that the deed was sufficiently executed, and would be registered on the next day; and it was registered accordingly. On the 24th of December a circular was sent to all the creditors (including the Plaintiff) announcing that in pursuance of this duly-registered deed the promissory notes had been delivered to the trustees, and might be had by the creditors on application.

Upon the 6th of February, 1868, *Latter* commenced an action

against *William A. White* on a promissory note for £1196. 3s. 6d., given by that person before the date of the composition deed. *William A. White* pleaded the deed, to which there was a replication that it had been obtained by fraud. The case was referred to arbitration, and ultimately *William A. White* withdrew from the reference, and the award was, by consent, made in *Latter's* favour; *Latter* took up the award, but did not appear to have acted on it.

The assets of *William A. White* were realized in December, 1868, and were handed to *Alfred White*, the Defendant in Error.

On the 7th of January, 1869, *Alfred White* gave notice to the trustees not to deliver the notes to *Latter*.

On the 1st of March, 1869, *William A. White* was declared a bankrupt on his own petition.

On the 16th of April, 1869, after the last of the three promissory notes had become due, *Latter* demanded from the trustees those which had been drawn in his favour. Delivery of them was refused in consequence of *Alfred White's* notice. This action was then brought. The Case, which set out these and other facts, did not contain any clause giving to the Court power to draw inferences from the facts therein stated. The case was argued before the Court of Queen's Bench in Trinity Term, 1870, and judgment given for the Plaintiff. Mr. Justice *Lush* dissented, on the ground that the Plaintiff having successfully traversed the validity of the deed in an action, was estopped from now treating the deed as a binding instrument. On Error to the Exchequer Chamber the judgment was reversed, and it was declared that the Plaintiff was not entitled to maintain the action. The case was then brought up to this House.

Sir *J. Karlake*, Q.C., and Mr. *John C. Day*, Q.C. (Mr. *Murphy* was with them), for the Plaintiff in Error:—

It is no obstacle to the right of the Plaintiff to recover under this deed that he has once contested its validity. Every creditor has a right to do that, and the deed may be binding upon him in spite of his opposition. If binding upon him his rights under it will be secured, and he may enforce them. If held to be invalid as to him it may be binding as to the rest of the creditors, and he may in consequence choose to proceed under it; should he do so his previous objection to it will not deprive him of any advantage

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it has professed to secure to a creditor. In the case of a person made bankrupt a creditor may contest the bankruptcy, but may be bound by it, and after being declared to be so bound the Court of Bankruptcy will treat him as it treats the other creditors. Here, too, there has been no legal finding that the deed was invalid, the description of it in the plea as being invalid amounts to nothing; the proof that it is invalid lies with the Defendant, but he himself has by his conduct established, as against himself, its validity, he has acted upon it, not only by paying other creditors, but by taking into his own possession the realized assets of his son's estate. The Plaintiff is under no obligation to establish the validity of the deed. As against this Defendant he has a right to assume it to be valid. The father here cannot now be allowed to say you cannot sue me because you did not give your assent to the deed, nor can you sue my son, for all his property has passed away from him under the stipulations in the deed. To allow that would be to give every advantage to the debtor, and to deprive the creditor of all remedy. Here the Defendant has promised to give notes to satisfy a composition with the son's creditors; the promise has not been performed; the Defendant is bound to make it good. The Defendant in his plea alleges that he made the notes and delivered them to the trustees, and his notice to the trustees not to hand over the notes is itself proof that they had been made; he had then no right to require the trustees to withhold the delivery of them from any particular creditor. The trustees became in law trustees to hold the notes for all the creditors under the deed.

After the registration of the deed the bankruptcy statute treats it as valid, and gives the Court of Bankruptcy jurisdiction over it, and there can be no execution issued against the goods of the original debtor. Of that remedy therefore, the Plaintiff is deprived. But there may be an action against the Defendant who came in as surety for that debtor, who has taken possession of the debtor's goods, and has entered into a deed promising to secure payment of his debts. If, looking at all the facts, there can be no doubt that the deed would be held valid, then no act on the part of the Plaintiff in bringing an action for his debt against the principal debtor can deprive him of his right and remedy at law under the deed.

It was supposed by one of the Judges in the Exchequer Chamber

that the release of the debtor was the consideration for the deed that was erroneous, the payment of the composition by the notes was the consideration in respect of which the creditors consented to release the debtor. That consideration ought to be performed.

The deed here makes the surety become a principal debtor for the purposes of the deed, and gives the creditor a clear right to proceed against him for the performance of the stipulations in it. Here the Plaintiff is not asking to recover his debt, but what the law makes him take for his debt. He is entitled to that, and cannot be prevented from recovering what the deed secures to him, merely because he has once contested the validity of the deed.

Mr. *Brown*, Q.C., Sir *G. Honyman*, Q.C., and Mr. *G. Francis*, appeared for the Defendant in Error, but were not required to address the House.

THE LORD CHANCELLOR (Lord *Hatherley*) said:—

Mr. *Brown*, supposing we were of opinion that the decision of the Court below ought to be affirmed, and were to append to our order, affirming it, a resolution that it should be without prejudice to any application the Plaintiff in Error may be advised to make to the Court of Bankruptcy; should you have any observation to make upon that?

Mr. *Brown*, Q.C.:—My Lords, my notion is that if your Lordships were to deliver judgment for the Respondent, even without such a resolution, it would not prevent the Plaintiff from applying to the Court of Bankruptcy.

LORD CAIRNS:—Then the resolution would do no harm?

Mr. *Brown*:—Precisely; that is my impression certainly.

THE LORD CHANCELLOR:—We shall not call upon you.

My Lords,—In this case there seems to have been some misfortune, or at all events some error, voluntary or otherwise, with reference to the mode in which the Plaintiff in Error, the Plaintiff in the Court below, has asserted the rights which he conceives himself to have in respect of certain promissory notes which were delivered, in pursuance of a composition deed made with the

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creditors of the son of the Defendant, to two trustees named in that deed of composition :—[His Lordship made a full statement of the facts.]

The first question that arises here, is as to the form of the action. It certainly appears to all of your Lordships that it was brought in a very singular form. The promissory notes were in the hands of the trustees—they had been placed in their hands, it is true, to be delivered over to the parties who should apply for them. This Plaintiff had originally refused to make any application for the notes. The notes remained in the hands of the trustees, and, after all these proceedings had taken place against the son, then an application was made by the Plaintiff for the notes. The parties who held them appear to me, I confess, to be in the position of stakeholders—they are stakeholders as between the son and the Plaintiff in the present action. What happened was this? The father and the son together having executed the notes, and the father being dissatisfied with what had taken place in this course of proceeding against the son, gave notice to the holders of the notes not to part with them, and thereupon they declined parting with them. I should have thought that if an action could be brought at all, the proper form of action to be adopted by the Plaintiff would have been an action against the trustees for non-delivery of the notes; but instead of that he brought an action against the father in respect of this notice which, it is said, he gave for the non-delivery of the notes. The trustees chose to act upon that notice, and to withhold the notes. The father did not ask to have them delivered back to him or to his son; he asked no such thing as that, he did not profess to be the sole owner of the notes, so as to be entitled to have a re-delivery of the notes to him. All that he said was: Do not deliver them to the person who is making the present application. My Lords, I apprehend that in such a state of things as that, the Plaintiff has no right to bring an action of *detinue* against the Defendant, a person who neither has the notes nor is entitled to demand them back from the trustees. I see no reason why he should be considered to be in a position in which he had absolute control over the notes; and certainly nothing that has been stated of the facts in this case makes it clear to me that the trustees were his servants, or his agents, so as to be in a condition to act solely on his

account, or so as to be able to say in a Court that what was done by them was done by him, the Defendant in the present action. He gave this notice either rightly or wrongly. Whether he was entitled to give it or not, is not, in that respect, of consequence, because the sole question is whether or not at that time the trustees were holding the notes as mere stakeholders, and were bound to hold them for the party entitled, but not bound to hold them absolutely for him. He gave them an order not to part with the notes. Of course, if they were simply his servants, the action was properly brought against him; but if they were in any other position than that of his mere servants, the action was wrongly brought against him. Here was a stakeholder holding the notes, and one party said, Deliver them to me; the other party said, Do not deliver them, I forbid it. The consequence is that the course of procedure should have been some mode of proceedings to bring that matter to an issue, but not, I apprehend, by bringing an action of *detinue* against the person who had not the notes at all, nor any power over them, but had simply given notice to the persons having the notes in their possession, not to part with them.

Then the action takes another form. There are counts in which the notes are declared upon as if the Plaintiff was the holder of them. Manifestly he was not the holder of them—they have never been parted with to him. He says, it must be one of two things. Either the trustees are agents holding them for me, in which case clearly and *simpliciter* I am the holder; or they must be holding them for the Defendant in the action, and then I am right in bringing my action of *detinue* against him. But it appears to me that a third case may be, that these gentlemen are holding the notes for the proper person, whoever he may be, who may eventually turn out to be entitled to them; but it would be absolutely inconsistent with his action of *detinue* to say that the Defendant holds them, because, as it appears to me, the Defendant is only asserting a right to stop the party who is attempting to get possession of them—and it does not on that account follow that he is the proper object of an action of *detinue*, and that the notes can be recovered from him, he not being in possession of them. And, on the other hand, the Plaintiff not being in possession of them cannot recover on them in an action for their amount, the true

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state of the case being simply that they are in the possession of these trustees who are holding the property in dispute.

That appears to me at once to be a fatal blot in this case. But there is another circumstance in the case. Assuming that the action could go on if this difficulty as to its form did not exist, we ought to determine, according to the view of one side or the other, whether or not this deed is a valid or an invalid deed. The Plaintiff has strongly argued that he is here prevented by the law of bankruptcy from taking out execution in respect of the original debt, and that being so, although he has in fact proceeded as far as to get a verdict in another proceeding in the assertion of his original right, yet he is stopped, upon the threshold of obtaining the fruits of his victory, by this deed being a valid deed, executed in such a manner as to bind him according to the statute. On the other hand, the Defendant asserts that it is a valid deed. So we have to inquire whether it is, or is not, a valid deed. And it is said that the one side or the other ought to prove that. It is argued on behalf of the Plaintiff that the Defendant's duty is to prove the invalidity of the deed. And if we had heard the counsel for the Defendant we should have heard an equally ingenious argument, insisting that the Plaintiff ought to have established its validity. But I apprehend that we are bound upon the case stated; and that it is no longer a question with us as to whether the one party or the other is bound to submit proof, but that the question for your Lordships is whether, having now all the facts of the case before you, your Lordships can arrive at a complete conclusion whether the one party or the other party has made that clear which ought in some form to be made clear to us. It should be made clear in some way or other, whether the deed is valid or invalid. We are in a complete state of doubt and uncertainty upon it, from this circumstance, that simply certain facts are stated. And the common precaution has not been taken of allowing the Court to draw inferences from the facts so stated. The statute (1) with reference to proceedings in Error only says this: That the Court of Error may draw any inferences which the Court below ought to have drawn. That only means that when the parties have entrusted the Court below with the duty of drawing inferences, then the Court above may draw inferences. If the

(1) 17 & 18 Vict. c. 125, s. 32.

Court below has drawn inferences which the Court above thinks erroneous inferences, as drawn from the statements, the Court above may correct the inferences, not being bound by the inferences drawn by the Court below. The Judges in Error may find such inferences as they think proper and just from the whole facts stated in the case. But when the Court below has no power to draw inferences the Court above is just in the same position. It has no greater power than the Court below in that matter. It has simply the power of correcting an imperfection in the previous decision, which may have arisen from an erroneous exercise of the power given to the Court below, so that here we are left in a state of complete uncertainty with regard to the condition of this deed. The whole of this unfortunate litigation, and the expense, inconvenience, and annoyance which it has caused to all the parties seems to have arisen from the failure to take a very simple course in the first instance for some reason or other—it is impossible to know why—whether it was a mistake, or whether there was some purpose in it. The Plaintiff has not gone to the very tribunal which could have administered complete relief to him, if he be right in all respects, namely the Court of Bankruptcy—which has complete power over the trustees holding these promissory notes—which has complete power to deal with them as if they were assignees in bankruptcy, and which therefore can administer justice between all parties; not only as between this single creditor on the one hand, and the father and the son on the other, but as between this creditor on the one hand, the father and the son on the other hand, and the whole body of creditors in the third instance. It was pressed upon us very much in the argument that what is wanted to bind all the creditors in this transaction is some such power as the Court of Bankruptcy has. That Court having all the parties before it would be able to say as regards all the creditors, not only these two who are in litigation, but all of them, what the rights of each and all of them were under this instrument which has been here executed.

It appears to me, therefore, my Lords, that the only mode of arriving at justice in this case, or rather of enabling the parties to arrive, if they think fit, at justice in the case, will be for your Lordships to affirm the judgment of the Court below, and dismiss the appeal, as usual, with costs, and to say that this affirmance shall

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be without prejudice to any application which the Plaintiff may be advised to make to the Court of Bankruptcy with respect to the matters in question.

LORD COLONSAY concurred.

LORD CAIRNS :—

My Lords, this case has been argued with very great ability, both by Sir *John Karslake* and by Mr. *Day*, and they certainly have in many respects placed it, to my mind, in a more satisfactory position than it seems to have assumed in the minds of some of the learned Judges in the Court below. They have contended that supposing you have got a creditors' deed which is valid under the *Bankruptcy Act* of 1861, a creditor who has not assented to the deed, but who is bound by the operation of the words of the statute, may bring an action for his original debt in order to test the validity of the deed, and that the mere bringing of the action will not forfeit any benefits to which he may be entitled under the deed. Then they have contended that if the matter goes beyond the bringing of an action, and if it results in a verdict or judgment which decides that the deed is valid, that verdict or judgment will not disentitle the creditor to any benefits to which he would be entitled under the deed. And they have farther contended that if the action should result in a verdict or a judgment not affirming the deed, but proving that the deed was invalid, and if the creditor should think afterwards that that was a verdict or judgment which could not be sustained as against the body of creditors at large, and that notwithstanding that verdict or judgment the deed is valid, still he ought not to be precluded asking for the benefits to which he is entitled under the deed.

Now, my Lords, it is not absolutely necessary, in this case, to decide these questions which have been thus argued with great ability, and I do not desire to be taken as expressing any final opinion upon them, but I am very much disposed to concur with all those arguments. But the difficulties which we have to encounter in the present case, before we can arrive at a decision upon these arguments, are these :—In the first place we have got an action of *detinue* brought for the recovery of these promissory notes, not against the persons who really hold the promissory notes, but

against another person who has given notice to the holders of the notes not to part with them. The persons who hold the notes are clearly not his servants or agents; they are independent persons—trustees appointed *in medio* between him and the creditors under the deed. And his notice may be right or it may be wrong, but it appears to me to be impossible to say that the possession of the notes by the trustees is the possession of the Defendant in the action, and that therefore the Defendant is liable to an action of *detinue* for detaining these notes, which are not in his possession.

My Lords, I am sorry to say that this appears to me to be an absolutely fatal impediment in the way of the Plaintiff. I think, if your Lordships were to disregard that impediment, the result would be a decision of this House affirming that an action of *detinue* will lie as against a person who has given notice to trustees not to part with some property which is in their possession. It seems to me that that would be a most alarming doctrine, and one for which there is no foundation, that I am aware of, in any authority.

My Lords, it would be enough to stop there, and to say that that is a complete impediment. But I may go farther, and say, that the whole of those arguments of the counsel for the Plaintiff, to which I said I was rather disposed to assent, turn upon this, that there is a *constat* of a valid deed under the Bankruptcy Act of 1861. That depends upon the statements in this case—statements which we are to deal with as we find them, without any power in your Lordships to enlarge upon those statements, or to draw inferences from them. Now I have looked with great anxiety through those statements, and I cannot find any statement whatever that the deed is a valid deed. I find a number of statements from which it may be argued that an inference ought to be drawn that the deed is a valid deed. But, again, there are other statements from which it may be argued that an inference ought to be drawn that the deed is not a valid deed. And I am bound to say that my own mind is in a state of perfect obscurity at this moment as to whether the deed is a valid deed or not. Now the validity of the deed being the foundation of the whole of the main arguments to which your Lordships have listened, and there being no statement affirming the validity of the deed, I think there again is another impediment which it is impossible for the Plaintiff to get over.

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I certainly do very much regret that a great deal of time has been lost, and a great deal of expense incurred, as it seems to me most unnecessarily, in this litigation, when there was a course perfectly open to the Plaintiff of going to the Court of Bankruptcy, which is the proper Court to deal with a deed under the Act of 1861, and applying for these promissory notes against the trustees. The great advantage of that course, if it had been taken, would have been this, that the Court of Bankruptcy would have been able to do complete justice between all the parties, and it seems to me to be very obvious that it would be just that some terms or conditions should be imposed upon the person applying now for these notes, having regard to the litigation which has been undertaken, and which has cost some person or persons a great deal of expense.

I quite concur with the order which it is now proposed that your Lordships should pronounce, namely, that this appeal should be dismissed, and that the judgment of the Court below should be affirmed with costs, but that this should be without prejudice to any application which the Plaintiff may be advised to make to the Court of Bankruptcy touching the matters in question in this case.

It was ordered that the judgment of reversal given in the Court of Exchequer Chamber be in all things affirmed, such affirmance to be without prejudice to any application which *Lawrence Latter* may be advised to make to the Court of Bankruptcy with respect to the matters in question in this cause. That *Alfred White* do recover against *Lawrence Latter* his costs sustained by reason of the delay of execution of the judgment aforesaid, on pretext of prosecuting the said suggested error. And the judgment roll and proceedings aforesaid are remitted to the Court of Queen's Bench to do execution thereupon, &c.

*Lords' Journals, 13th June, 1872.*

Attorneys for the Plaintiff in Error : Messrs. *West & King*.

Attorney for the Defendant in Error : Mr. *C. P. Pritchard*.

GREENE & KING, SUING FOR THE LONDON }  
 FINANCIAL ASSOCIATION . . . . . } APPELLANTS;

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AND

BENJAMIN BATEMAN . . . . . RESPONDENT.

*Misdirection—Implied Fraud.*

The mere refusal by a Judge to direct a jury to find for a Plaintiff or a Defendant does not constitute misdirection. The evidence on which his refusal was founded and the reasons for impeaching it must be stated to him at the time.

In an interpleader issue *B.* claimed certain iron as his property. The iron had been seized under a writ of *fi. fa.* issued at the suit of *F.*, a judgment creditor of the *L.* railway company, in whose possession the iron was when the seizure took place. The evidence shewed that the *L.* company had obtained possession of the iron through the act of *G. & K.* These persons had purchased it from *B.*, and had given bills for it, which were in danger of not being honoured. In that state of circumstances they represented to *B.* that if he would allow them to have possession of it and to hand it over to the *L.* company, that company would become in a position to exercise its borrowing powers under its Act, and *G. & K.*'s bills could then be honoured. *B.* said that he would consent, provided that his rights were not impaired. *B.*'s agent accordingly delivered the iron to *G. & K.*, who then put it into the possession of the *L.* railway company, after which it was taken in execution under the *fi. fa.* At the trial of the interpleader issue the Defendant's counsel contended that by the transfer of the iron with the bills of lading the property had completely passed to the *L.* railway company, and on that ground called on the learned Judge to direct a verdict for that company. The learned Judge refused, and the jury found a verdict for the Plaintiff *B.* This verdict was sustained in the Queen's Bench on motion for a new trial; and the Exchequer Chamber affirmed that decision. On appeal to this House it was contended that *B.*'s permission to allow the iron to be put into the possession of the railway company was an illegal contrivance to evade the provisions of the company's Act, and thus enable a cheat to be practised upon the persons from whom the company proposed to borrow money, and being so, deprived *B.* of the right to assert his title to the iron which he had, for such fraudulent purpose, allowed to be transferred to the company, and that the Judge had been guilty of a misdirection in not directing on this ground a verdict for the Defendants.

*Held*, that this objection which had not been raised at the trial could not now be received; that such objection ought to have been presented and substantiated by evidence at the trial; that on it the learned Judge should have been called on to give his direction to the jury; and that as nothing of this sort had been done there was no misdirection.

THIS was a proceeding in Error under the *Common Law Procedure Act (Ireland)*, 1856.

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Two persons named *Henry Greene* and *Charles Welden King* were railway contractors, who had entered into a contract with the *Letterkenny Railway Company* in *Ireland* to perform certain works on a projected railway of that name. In the year 1864, the railway company had given to *Greene* and *King*, *Lloyd's* bonds to the amount of £12,000. These bonds had been transferred by *Greene* and *King* to the *London Financial Association*, and in November, 1866, that association, in the names of *Greene & King*, as Plaintiffs, brought an action on the bonds to recover their amount. Judgment was entered by consent against the railway company for the sum of £13,653 9s. 1d., and was registered on the 7th of December, 1866. On that day a *fi. fa.* was issued, and a large quantity of iron rails and fastenings found upon the premises of the railway company was seized by the sheriff. A person named *Bateman* thereon applied to the Court, claiming these rails and fastenings as his property, and an interpleader issue was directed in which *Bateman* was directed to be the Plaintiff and *Greene & King* Defendants. The issue came on for trial before the Lord Chief Justice of the Court of Queen's Bench in *Ireland* at the sittings after Hilary Term, 1867, when evidence was given that in May, 1864, *Bateman* had agreed to sell the iron in question to *Greene & King* to be delivered in the names of *Greene & King*, but the property in the iron was to remain in *Bateman* till the bills given for it were paid. On the 11th of October, 1864, *Greene* saw *Bateman*, and said that the company was short of funds, not getting in subscriptions very fast, and that there would be difficulties in paying for the iron at the time originally proposed, but that the company was getting near the position in which the directors could make use of their borrowing powers, and *Greene* asked *Bateman* to permit the iron to be delivered to the company so as to enable him (*Greene*) to complete his contract for the execution of the works, and to obtain from the directors money to pay the bills. *Bateman* consented. How this consent was asked and given was the question under the interpleader issue. *Bateman* swore that it was given on condition that his rights were to remain intact, and that, in any case, he was to occupy no worse position by anything that *Greene* did. *Bateman* afterwards received through *Greene & King* a considerable number of shares in the company with the regular deeds of transfer: but he declared that they

were left with him merely as collateral security, to be returned when the financial arrangements were concluded, that at *Greene's* desire he had handed over a large number of them to other persons, and had never received one farthing upon them. It was also in evidence that he had applied to the secretary to have these shares registered in his name, and, at the same time, to have them stamped with the company's stamp as "fully paid up"—that the former request had been complied with, but that the latter had not. The shares of the company were unsaleable when they were delivered to *Bateman*. *Greene & King* were (though nominally the Defendants in the issue) called by *Bateman*, and substantially corroborated his evidence.

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On the other hand, the secretary of the company stated that he had no notice of *Bateman's* contract, or the claims under it, till the 2nd of November, 1866. The bills of lading of the iron were in the usual form, were in favour of *Bateman's* agent, *McGrotty*, had been indorsed by him to the contractors, then indorsed by the contractors and handed over to the company.

The object of the arrangement as to the bills of lading was to include the value of the rails in the company's property, and by thus increasing the amount of its declared property to enable it to use its borrowing powers. Other evidence was given with a view to shew that *Bateman* knew the real nature of the transaction; but there was no direct evidence to that point, and *Greene*, on being recalled, said: "I told *Grove*, the secretary, that *Bateman* had allowed me to get the bills of lading for the purpose of swelling the certificate for the company, and I told the board distinctly that they could only get the bills of lading on these terms—and they accepted the bills of lading on these terms." He had previously said (and his evidence on being recalled was intended to reiterate the statement): "I told them I could not give them the iron without *Bateman's* permission, because the iron was not ours till our acceptances were paid." There was other and contradictory evidence upon this point. After the jury had retired to consider the verdict the Defendant's counsel called on the Chief Justice to direct a verdict for the Defendant company (the *Financial Company*) on the following grounds:—

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First, that the Plaintiff having consented to the indorsement of

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the bills of lading and delivery of the iron to the railway company is estopped from afterwards claiming the iron as his own.

Second, that the railway company had no legal notice of Plaintiff's claim.

Third, that the indorsement of a bill of lading cannot be qualified by a contemporaneous parol agreement.

Fourth, that the agreement of the 11th of October, 1864, did not bind the company.

Fifth, that on the bankruptcy of *Greene & King* the property passed to the railway company under the contract of January, 1864.

The Lord Chief Justice declined to give on these grounds a direction to the jury to find a verdict for the Defendant company.

The jury found a verdict for *Bateman*; a rule was afterwards obtained to set aside the verdict on the ground of misdirection, and also as a verdict against the weight of evidence, but the rule was discharged; and on appeal to the Court of Exchequer Chamber the decision of the Court below was affirmed (1).

The case was then brought up to this House.

Mr. *Field*, Q.C., and Mr. *Thesiger*, for the Plaintiffs in Error:—

The evidence here leaves no doubt that a fraud was attempted to be practised on the enactments of the Legislature and on the confidence of the public. The Legislature had granted to the *Letterkenny Railway Company* certain borrowing powers, which were only to be exercised upon certain conditions. Those conditions were meant to afford security to the public, and especially to the lenders of the money. The contrivance between *Greene & King* and the railway company on the one hand, and between them and *Bateman* on the other, was, by fraudulently bringing the borrowing powers of the railway company into operation, to defeat the object of the Legislature and to render useless the security which was to be offered to those who were to lend their money. There can be no reasonable doubt that *Bateman*, accustomed to dealing with these companies, and aware, as a man of his experience must have been, of the modes adopted to raise money in the market, perfectly understood the proposal made to him by *Greene*, and the evidence

(1) Ir. Rep. 2 Com. Law, 166, 607.

of *Greene* distinctly points to that result. He cannot now repudiate the whole proceeding and claim an absolute property in the iron, as if no such proceeding had taken place. In *Doe d. Roberts v. Roberts* (1) the principle was stated which must govern this case. There one brother had executed to another a conveyance of land, the real object of the conveyance being to give a colourable qualification to protect the latter against an information for having violated the [game laws. When the brother for whose benefit this fraudulent conveyance was executed brought ejectment upon it, the Court of King's Bench refused to allow the other to set up the fraud as a defence, and acted upon the principle that no man shall be allowed to allege his own fraud to avoid his own deed. And in *Brackenburg v. Brackenburg* (2) the same principle was acted on in Equity, and the Court refused to grant an injunction to stay proceedings in ejectment where a conveyance of land had been made, (as in the other case), to give a fictitious qualification to kill game, and this fraudulent conveyance had been lent by the proper owner of the land to the other, to enable that other to commit a fraud upon a third person by winning a wager from him on a point in dispute between them, whether he had a qualification or not. That last case is precisely in point, for here the lenders of money were to be made the subjects of a fraud, by being made to believe that the property and investments of the railway company were sufficient to afford that security for borrowed money which the Legislature had intended to provide for the benefit of the lenders.

When these facts were proved, as they had been, it became the duty of the Judge at the trial to tell the jurors that a case of fraud had been made out, and that consequently *Bateman* had no right to the iron, but that the verdict must be for the *Financial Association*, which was an entirely innocent party.

Sir *G. Honyman*, Q.C., and Mr. *Watkin Williams*, for the Defendant in Error:—

There is not a pretence for this proceeding in Error. The interest of the *Financial Association* is the interest of *Greene & King*; all those parties are identical, or else the association must be treated

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(1) 2 B. & Ald. 367.

(2) 2 Jac. & W. 391.

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as appearing here seeking to reverse a decision to which it was not a party. The association has the rights of *Greene & King* and no more, and no other. The ground now taken is not that which was taken in the Court below, where no pretence of fraud was put forward, but it was insisted that the delivery at the wharf was sufficient to operate a transfer of the property, and to constitute the railway directors and the contractors, or either of them, the legal owners of the iron. The knowledge of *Bateman* as to the true nature of the purpose of *Greene & King* and of the railway company is positively denied, and that participation in the deceit which was established in each of the two cases cited having no existence here, those two cases are wholly inapplicable. There was one Judge in the Court below, but only one, who thought there ought to be a new trial in order to raise the point of fraud, which nobody had before thought of, but that was not a ground on which this House ought to found its judgment to set aside a decision all but unanimously approved of in the Courts below.

Mr. *Field*, in reply.

THE LORD CHANCELLOR (Lord *Hatherley*) after fully stating the case said :—

On these facts it seems to me that the device does not affect *Bateman*, but only *Greene* and the company.

It was argued before us that *Bateman*, being the man supplying the iron, and having a good deal to do with railways, must have known exactly what was meant when *Greene* said to him, Only let me have the power of dealing with the iron, so that I can hand it over to the company, and so that a certificate can be given to me by the engineer of the works, and then the result will be that the company will be able to use its borrowing powers. And it is contended that he must have known all this contrivance and arrangement by which he was to be paid, when the certificate was given, in shares, which shares were to be considered as paid-up shares, his own fraud being thus made the medium by which he was to arrive at this result. *Greene* represents *Bateman* as saying to him, I do not care about doing this, provided you make me safe, so that I may keep my hold on the property until the contract is fulfilled to

me. *Bateman* does not put that nearly so high as *Greene* does, and the learned counsel for the Appellants was obliged to rely almost wholly on *Greene's* evidence to bring the point at all up to what he wished to arrive at. For *Bateman* simply says that he was told that allowing the property to be made over to the company would have the effect of producing cash, and enabling the directors to obtain money; but he does not enter into the details about the certificate, or about the consequences of that certificate, as enabling them to defeat the provisions of their Act in respect of their borrowing powers. He does say he was told that they were near their borrowing powers, but as to any part of the machinery by which this was to be effected he says nothing. The whole rests on *Greene's* evidence, and that is the effect of *Greene's* evidence as far as it can be carried.

Now we are told that we must assume the whole of this arrangement to have been known to *Bateman*, and the case is put thus:—The arrangement itself would be illegal. It would be a fraud upon the Legislature, and it would be a fraud upon persons who were induced to advance money, to represent to them that the company had a quantity of iron and a number of paid-up shares when the truth was that it would be only a sort of juggle, by which a quantity of iron (in which they really had no interest whatever until it was paid for), was to be represented as being property in the first place in the hands of their contractor, and then made over by the contractor to them. That would constitute them debtors to their contractor for the value of the iron, and then the contractor was to be paid by means of shares, and those shares were to be represented as paid-up shares and were to bring their borrowing powers into force. All this contrivance was a fraud and a deception, to which *Bateman*, in the manner described, is attempted to be made a party.

Some reliance has been placed on a class of cases (1) in which there were two parties to a contrivance wherein the Defendant in the suit and the Plaintiff in the suit were both equally engaged, and then, the Defendant being the holder of property, and the Plaintiff seeking to recover it back, it has been held that if there

(1) *Doe d. Roberts v. Roberts*, 2 B. & Ald. 367; *Brackenbury v. Brackenbury*, 2 Jac. & W. 391.

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be the perpetration of a fraud, either against a public statute, such as that relating to the qualification for killing game, or, as in another case, much to the same effect, against good faith with a private individual, the Plaintiff would be defeated. The latter was a case which came before Lord *Eldon*, and he refused to exercise the powers of the Court of Chancery to protect in the possession of his property a man who had, for fraudulent purposes, pretended to convey it away.

It is not necessary to go into the question of the principle of these cases, or to consider to what extent they are or are not properly carried out in other reported decisions. It is not at all for me to question, or to pass any opinion upon them, because it appears to me that this case does not arrive anywhere near those cases. In the first place, the persons in possession of this property are those who form the *Letterkenny Railway Company*. The proprietors of that company undoubtedly could not pretend to be the owners of the iron, except on the principle of being in possession of it through the act of Messrs. *Greene & King*, who themselves were not the owners of it. The Plaintiffs in Error here have obtained possession only in this way: that an execution has been levied, and they have thus obtained possession. In the sheriff's hands the goods are stayed by interpleader; the two parties are set to interplead; and in the case of interpleader one party must be Plaintiff and the other Defendant. That is very different from endeavouring to obtain from an ordinary creditor possession of that property of which he has been long in possession. It would be a very strong test of the class of authorities to which we have been referred, and a great extension of the principle, if we were to hold that *Greene & King* on the one hand, and the *Letterkenny Railway Company* on the other, were to be allowed all the benefit of the contrivance, and that that company was to be relieved from its debt, and *Greene & King* were to receive this property at the expense of those to whom the debt ought to have been paid. It appears to me that the evidence is perfectly consistent with *Bateman* being as innocent as possible of any knowledge of this improper agreement. It is not to be assumed as against him, because he deals in minerals that are supplied to railways, that he knew all the terms of this Act of Parliament. But if he knew the terms of the Act, it is by no

means to be assumed that when *Greene* said to him, If you will let me hand over the iron I can obtain a certificate, and thereby the railway directors will find the means of bringing themselves up to the borrowing powers, and consequently they will replenish themselves with money,—that therefore he was a party to a deception. The whole is, in a variety of ways, perfectly consistent with his innocence of any fraud—seeing his desire to enable the railway to be made, constructed, and finished, and to enable the contractors to be paid in respect of what they had done, or to go on with other works which they might be desirous to do, or to induce people to take more shares in the company from seeing it advancing prosperously, or possibly by placing the contractors and the directors in such a position of mutual confidence that more money might be raised. But whether any question of this sort occurred to Mr. *Bateman*, his interest in this iron was of course a very different matter. It is impossible for the present Plaintiffs in Error, who stand in the precise position of *Greene & King*, on the one hand, or for the railway company on the other, to be allowed to defraud of this property, by their combination, this gentleman. When the counsel for the Association desired to rely upon this roundabout contrivance which was to be brought home to *Bateman's* knowledge, there was a very plain way of effecting it. *Bateman* was called on his own behalf, and, after having told his own story, *Bateman* might have been asked a very simple question in cross-examination: “When you were told all this, did you not know what it all meant? Were you not well aware, as a dealer in iron in the habit of supplying railway companies, and well acquainted with all their affairs, that this was a mere contrivance to which you were lending a hand?” But no such question was asked. It appears to me, therefore, that there was no evidence on which the jury could properly have found in favour of the Defendants in the issue, who are the persons in whose position the present Plaintiffs in Error stand.

But there is another objection in point of form. I have the more readily entered into the full detail of the question as to the substance, because it is much more satisfactory to rest upon the acts of the parties than upon any objection in point of form; but the only objection we have properly before us under the Act of Parliament is an objection for misdirection of the learned Judge. But

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I do not perceive any misdirection of the learned Judge in any possible view of the case. He was asked to direct the jurors to find for the Defendants, and they found for the Plaintiff; but there is no misdirection, unless there is something wrong or erroneous in what he lays before the jury, or unless he improperly withholds a direction, when the grounds for it are distinctly and clearly stated by the counsel who asks him for it. It might possibly have been that having given a direction only in part, when he was bound to direct on the whole, he had misdirected. But I do not find that anything of the kind has been done. The learned Judge seems to have directed the jurors in the only manner in which he could direct them, unless this point had been fairly and directly stated during the trial, and then, perhaps, we should have had the benefit of the learned Judge's opinion during the trial on the sort of point that has been raised. It does not appear to me that on the trial any such point was raised at all. And, therefore, on every ground, both on the ground of its not being open on the only question on which it could be open, as to the misdirection of the learned Judge, and failing in that ground still more on the merits, the Plaintiffs in Error are in the position of having failed altogether to establish their case. And the only result we can arrive at is to affirm the decision of the Court below, and dismiss the appeal with costs.

LORD COLONSAY:—

My Lords, I concur in the judgment which has been suggested. The first point, I think, for consideration is, whether there has been made out that which it was necessary for the Appellants to make out—that there was misdirection on the part of the learned Judge. Now, on reading the proceedings of the Court below, I can find nothing to which I could point as misdirection on the part of the learned Judge. At the close of the trial the counsel for the persons who appeared as the Defendants in the issue asked the learned Judge to direct the jury to find for the Defendants, and the Judge did not do so. No suggestion was made as to the direction farther than the demand for a direction to find for the Defendants. Now, my Lords, that is a very curious kind of direction to apply for, as a ground for afterwards complaining of a

misdirection. Such an application might be made in every case, and if it is to cover everything that could possibly be suggested afterwards, it would place Courts in a very awkward position. But it does not rest there. After the arguments of counsel were concluded, then, again, a movement was made to require the learned Judge to give a certain direction. Now, upon that occasion he ought to have been asked to give that direction which in fact entitled the Defendants to a verdict. Among those directions which he was asked to give I can find none on the point that is now maintained on the part of the Appellants; and I am to presume that all the directions that were given by the learned Judge were such as the Defendants had no objection to, and that nothing was omitted which they thought ought to be stated, except that which they required the Judge to state. Therefore there is the absence of anything to which we can look as a misdirection on the part of the learned Judge, and that of itself would be sufficient. But if there is an absence of fact as to the matter of misdirection, and if it is only out of some strange construction of all that appears to have proceeded at the trial, that we are to gather a misdirection, I think, when we come to look at the ground on which it is said that the learned Judge ought to have directed a verdict for the Defendants—viz., that of fraud as against an Act of Parliament, whereby the public would be deceived and probably the Act of Parliament violated—and when we come to look at the evidence in support of that, it is equally vague with the other part. The ground on which fraudulent conduct is imputed to this party is a gathering up of various circumstances which are stated to us, some of them appearing on the record and some of them not appearing on the record, but certainly only a portion of them being brought to the knowledge of the party. We are required to import into the case a knowledge of the particulars of the Act of Parliament under which this railway was in the course of being made, of the borrowing powers, and so forth; and also a knowledge of the particular mode by which the possession of these rails was to be used in this matter, for the purpose of getting the borrowing powers into operation. Fraud is not to be inferred by mere suggestions of this kind; fraud is not to be eked out in this way by supposing that a party ought to have known or might have known

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something that was intended. It is required to be plainly charged, and when the party against whom fraud is imputed is presented in the witness-box, I think it is quite incumbent on the party who intends to impute fraud to put all the matter on which the fraud is suggested to the accused party upon his oath. But that was not done here, and all that I can discover is this, that Mr. *Bateman* all along said, "I will let you have the rails, provided my rights under my contract are not impaired by that proceeding." That was all. It does not appear that he knew what was going to follow, and it must be inferred, I think, that he wished his rights to be preserved; yet if he had known that it was to be a fraudulent proceeding altogether, his rights would not have been preserved. He could only say this: "I will let you have those rails provided my rights are preserved—that is, provided nothing is done which will impair my rights afterwards." I think this is the true meaning of what he is proved to have said. Therefore I think, both on the question of law and on the matter of fact, the appeal should be dismissed.

LORD CAIRNS:—

My Lords, it has been very properly admitted at your Lordships' Bar by the learned counsel for the Plaintiffs in Error, that this case is now reduced to a simple issue of law, which would alone be the subject of appeal—whether there was, or was not, misdirection on the part of the learned Judge at the trial. The learned counsel for the Plaintiffs in Error was asked what was the misdirection that he relied upon; he answered, the misdirection was, that the learned Judge did not direct the jury to find a verdict for the Defendant. He did not object to anything that the learned Judge did say, nor suggest that in law there was anything wrong, or anything that could be challenged in it; but he said his objection was, that the learned Judge should have said something which he did not say, namely, that he should have told the jury to find a verdict for the Defendants (1).

(1) The principles applicable by analogy to such matters appear to be stated in cases on bills of exceptions. A bill of exceptions which sets forth what a Judge was asked to direct, and alleges that he refused to give such direction, is informal and bad. A bill of exceptions should state what direc-

Now, in the first place, that is a matter which the learned Judge, if he was expected to do it, ought to have been called upon at the trial to do, upon certain and specific grounds. He was called upon to direct the jury to find a verdict for the Defendants, but not upon the grounds which have been now urged at your Lordships' Bar. He was called upon by the counsel for the present Plaintiffs in Error to direct the jury to find a verdict for the Defendants upon five grounds (see *ante*, p. 593). All but the first are now admitted to be out of the question.

The first ground points to the effect of an unqualified indorsement of a bill of lading, but does not point to the question which is now urged, namely, illegality in the purpose for which the iron was allowed to be delivered to the railway company. In fact, it is perfectly clear that this idea of illegality is an entire afterthought; it was never thought of at the trial; it was never thought of till the parties had left the assizes, and had come to look over the evidence in calmer moments. It then occurred to their minds that the defence of illegality might be set up, and might be urged before the Court in banc. My Lords, whether it would have been right if the Court had acted upon the ground that something more had been discovered on the subject of this illegality, to have directed a new trial on the payment of costs, I offer no opinion; that is a matter which was entirely within the discretion of the Court, and which has not been brought, and could not have been brought, before your Lordships by way of appeal. The only question upon appeal before your Lordships is whether the Judges in banc were bound to hold that there had been, in what was actually done at the trial, misdirection on the part of the learned Lord Chief Justice. It appears to me, that it was impossible for the Court in banc to say that there had been misdirection when the only ground for it was that of a defence that never suggested

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tions the Judge gave, as it is misdirection, and not non-direction, which is the subject of an exception: *Anderson v. Fitzgerald* (4 H. L. C. 484). And see *Bain v. The Proprietors of the Whitehaven Railway Company* (3 H. L. C. 1); a bill of exceptions stated one ground of objection to the admissibility of evi-

dence, which ground of objection was invalid, while there was another ground of objection that was perfectly valid, but this other not being stated on the bill of exceptions the House refused to take notice of it. See Lord Brougham's Observations, p. 16.

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itself to the mind of any person at the trial, and that was suggested for the first time before the Court in banc.

But now let us look, my Lords, at what that defence is. It is said that Mr. *Bateman* was a party who allowed the iron in question to be handed over to the railway company in order that a certificate might be made by the engineer of the railway company, as if the iron had become the company's absolute property—a certificate entitling the contractor to payment—and that thereby the contractor might obtain as his payment certain paid-up shares which he was to have under his contract for the company, and that thereby the directors might be allowed to represent to a magistrate or magistrates that that amount of their capital had been paid up, and thereby thus enter into the exercise of their borrowing powers. My Lords, the whole of that chain of facts, in order to make it at all applicable or relevant to the present case, must be brought home to the knowledge of Mr. *Bateman*. If it was not within his knowledge, it is certainly irrelevant for the purpose we have to consider. Mr. *Bateman* was a witness in the case. Mr. *Greene*, whose rights are now possessed by the Plaintiffs in Error, was also a witness. Mr. *Bateman* did not say a word which would imply that he had notice of the facts or the purpose to which I have referred. Mr. *Greene* says that he, in conversation with Mr. *Bateman*, made certain statements to him—statements which, when you come to read them now, with the knowledge that your Lordships have of the contracts subsisting between the contractors and the railway company, and the knowledge which your Lordships also have of the parliamentary powers possessed by this railway company, are statements which may lead you to infer that any person having all these items of knowledge, might have derived from them the inference that it was intended to use this iron for the purpose which I have mentioned. But unless it was shewn that Mr. *Bateman* had these elements of knowledge, and unless Mr. *Bateman* had a knowledge of a somewhat peculiar character of the terms of the contract existing between the contractors and the railway company, unless Mr. *Bateman* was aware of the form and the limits of the parliamentary borrowing powers of the railway company, the statements made to him by Mr. *Greene* could have no meaning whatever, and Mr. *Bateman* would have such a know-

ledge only as he himself confesses to—that it was desirable that the iron should be handed to the railway company, and that he was willing that that should be done provided his own position should not be prejudiced. My Lords, if it was wished to be held that Mr. *Bateman* had any knowledge which would lead to his being held to be affected with notice of this illegality, he ought to have been asked directly questions which would have tested whether or not he possessed the knowledge in question. He was in point of fact asked no such questions, and it is not surprising that he was not, because, as I said before, it is quite clear that the idea of illegality was an after-thought, that it never entered the mind of any person at the time of the trial, and it would be the rankest injustice after that state of things to hold that Mr. *Bateman* was affected with notice of the illegal purpose which is now relied upon.

My Lords, upon these grounds, without going into any farther difficulties which would be in the way of the Plaintiffs in Error if these were removed, I, without any hesitation, concur in the judgment which my noble and learned friend on the woolsack has suggested, that the appeal be dismissed with costs.

Orders appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 18th June, 1872.

Attorneys for Plaintiffs in Error: *Markby & Tarry.*

Attorneys for Defendant in Error: *Thomas & Hollams.*

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May 7, 10

THOMAS GRIFFIES DIXON . . . . . APPELLANT ;

AND

LEWIS HENRY EVANS . . . . . RESPONDENT.

[*In re* AGRICULTURIST CATTLE INSURANCE COMPANY.]*Company—Contributory—Compromise—Directors—Powers—Costs.*

5 C/D 28  
Supposing it to be within the power of each of two parties to make a compromise, all that a Court of Justice has to do with respect to it, is to ascertain that it has been *bonâ fide* made.

If so made, then, unless manifestly *ultrâ vires* of the parties, a Court of Justice ought to respect it, and not allow it to be questioned.

*W.* was an official in *Scotland* of an English company ; the company desired to have a board of directors there. *W.* suggested to *D.*, who lived in *Scotland*, to take shares and become one of the intended directors. *D.* objected on the ground that it was not a company of limited liability ; *W.* assured him that he should be secured against loss, and that a bill was then about to be presented to Parliament to limit the shareholders' liability. *D.* thereon consented, and *W.* applied in his name for ten shares, obtained an allotment of ten, and paid the deposit on them. This deposit was never repaid by *D.* to *W.* *D.*, at *W.*'s request, signed a proxy paper, and also a receipt for a dividend, which, however, was in fact paid to *W.* The bill in Parliament was not passed. Some time afterwards, a call was made on *D.* in respect of his shares, of which he took no notice ; another call was made ; he denied his liability, and desired *W.* to state the facts to the directors, and to claim his discharge from liability. *W.* did so ; and the directors, who by the resolution of a general meeting possessed powers to make compromises in disputes with shareholders (though not, in terms, to cancel shares), consented that, on *D.*'s paying a certain call then due his shares should be cancelled. The money was paid, and *D.*'s name was struck out of the list, and a balance sheet with his name struck out was presented at a general meeting, as containing a list of persons whose shares had been cancelled. So things remained till some years afterwards, when the company was ordered to be wound up ; and *D.*'s name was put upon the list of contributories :—

*Held*, that it must be removed therefrom ; that the directors had had the power to make a compromise of a disputed claim, that this case came within the power, and that the power had been *bonâ fide* and rightly exercised.

At the Rolls, where the case was first heard, *D.*'s name was ordered to be removed from the list of contributories. On appeal, the Lord Justice directed it to be replaced on the list. This House reversed the Lord Justice's order, restored that of the Master of the Rolls, and directed that the costs on the appeal in the Lord Justice's Court should be repaid to *D.*

THIS was an appeal against a decision of Lord Justice *Giffard*, by which a previous decision of the Master of the Rolls had been

reversed (1). The facts are fully stated in the report in the Court below, and it is not necessary here to give more than a summary of them.

The *Agriculturist Cattle Insurance Company* was formed in 1845 as an unlimited company (2). Mr. *D. Wilkie* was the manager for the company in *Scotland*, and the company being in want of a board of directors there, Mr. *Wilkie*, who was acquainted with Mr. *Dixon*, the Appellant, suggested to him that he should become a shareholder in the company, in order to be one of the intended board of directors. The Appellant objected that the company was not one of limited liability, and *Wilkie* assured him that there was about to be brought into Parliament a bill to render it a limited company, and that if he became a shareholder he should not be required to sign the deed of settlement, and that in the meantime he should be protected against all loss. On the representation and promise thus made, the Appellant consented. *Wilkie* accordingly procured for him an allotment of ten shares, and paid the deposit, which was never repaid to him by *Dixon*. In May, 1846, *Dixon* signed the appointment of a proxy for a meeting. In January, 1847, a dividend was declared at the rate of three per cent. for the half year, and this dividend was actually received by *Wilkie*, though the receipt for its amount was signed by *Dixon* himself. These were the only two acts performed by *Dixon* in his character of a shareholder. A bill was brought into Parliament to create the company one of limited liability, but did not pass. In February, 1848, a call of £1 per share was made, which *Dixon* refused to pay, although threatened with proceedings to enforce it. In August, 1848, there was a second call of £1 per share, on receiving notice of which *Dixon* wrote to *Wilkie*, reminding him of all that had occurred, and calling on him to explain this to the directors, *Dixon* observing, "I wish well to the company, and have uniformly insured my stock with it, but I do not think that, under the circumstances, I can be fairly held a responsible shareholder." The affairs of the company being embarrassed, meetings of the shareholders were held in October and November, 1848; and at a meeting of the 13th of November, 1848, an arrangement known

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(1) Law Rep. 5 Ch. Ap. 79.

company quoted in *Spackman v. Evans*,

(2) See the deed of settlement of the

Law Rep. 3 H. L. 172, n.

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as “The *Chippenham* Arrangement” (1) was made, by which power was given to the directors to release certain shareholders who paid up £4 per share on their shares, from any farther liability. *Dixon*, not considering himself a shareholder in the company, did not attend these meetings. Mr. *Wilkie* did what was required of him, and said in his letter to the secretary that “*Dixon*, in law, may probably be considered bound, but it is thought it would be considered equitable that he be released,” and he asked the directors to “cancel *Dixon’s* name on payment of the calls that have been made.” The secretary finally wrote to *Wilkie*, “I think the directors will accept payment of calls, and allow these shares to be cancelled.” The £4 per share were paid, and the shares declared to be cancelled. There was a general meeting of the shareholders on the 23rd of November, 1849, at which a balance sheet was presented, with a statement of sums received on account of “shares cancelled,” and there was under that head an entry of a receipt of £40 as from Mr. *Dixon*, on account of ten cancelled shares. The company was on the 28th March, 1861, ordered to be wound up, and Mr. *Dixon’s* name was put on the list of contributories. On application to the Master of the Rolls it was ordered to be struck off; but Lord Justice Giffard, on appeal, directed it to be restored, his Lordship saying: “I sincerely wish that I could follow the very able judgments of Lord *St. Leonards* and Lord *Romilly* in the House of Lords, in *Spackman v. Evans*, but unfortunately I cannot do so; for, able as those judgments were, they failed to prevail with the majority of their Lordships, and I must take the law to be this, namely, that in this particular company there is no power simply to cancel shares, no power simply to discharge a shareholder” (2). This appeal was then brought.

Sir *R. Baggallay*, Q.C., and Mr. *Marten*, for the Appellant:—

The decree of the Court below was founded upon an erroneous view of previous decisions. The Appellant never had been a shareholder; but even if it should be deemed that he had, without intending it, taken upon himself that character, he had done so only on a condition which had never been performed, and he had been

(1) Law Rep. 3 H. L. 180.

(2) Law Rep. 5 Ch. Ap. 84.

duly released from all its obligations. *Spackman's Case* (1); *Smallcombe's Case* (2). In the latter case much was said about the shareholder not having, within the proper time, done that which entitled him to the benefit of the *Chippenham* arrangement. But the House, seeing that all had been done *bonâ fide*, and that years had elapsed since his shares were cancelled, held that he was discharged. The same principle was declared in *Houldsworth's Case* (3), though there the assent to the *Chippenham* arrangement was not made within the time required by that arrangement itself, and therefore the directors were held not to have power after that date to release the shareholder. Here the course of this Appellant has been uniform. He has always denied his liability, always repudiated the character of a shareholder, and there has not been any delay on his part. At the utmost he had only consented to accept shares on a condition, which condition had never been fulfilled. If the arrangement was binding on both parties the conditions of it had not been performed. If it was not binding on the company then there was no mutuality in it, and it could not be binding on the Appellant: *Pellatt's Case* (4). There the condition on which *Pellatt* took shares was that he was to receive orders for £1000 worth of goods, the amount to be set off against calls, and it was held that if this agreement was *ultrâ vires* it could not be binding on either side; if *intrâ vires*, then the stipulations of it not having been performed, *Pellatt* was released. The object for which *Dixon* was here asked to take the shares was that he might become a director in *Scotland*. He never did become a director. In *Elkington's Case* (5) there was an agreement to take shares, and there was an agreement to take goods, but the two agreements were independent and distinct from each other, each was valid in itself, and therefore the failure to perform the one not affecting the performance of the other the liability on the shares taken was enforced. Here the whole agreement to take the shares depended on the being held free from all personal responsibility. That was the binding condition on which alone they were accepted, and that condition was not performed. *Beresford's Case* (6) esta-

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(1) Law Rep. 3 H. L. 171.

(5) Law Rep. 2 Ch. Ap. 511.

(2) Ibid. 249.

(6) 2 Mac. & G. 197; 3 De G. &

(3) Ibid. 263.

Sm. 175.

(4) Law Rep. 2 Ch. Ap. 527.

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blishes that there may be a contract with a company, and yet the person entering into it may not fill the character of a shareholder if he has not executed the deed of settlement. That was the principle on which the judgment of Lord Commissioner Baron *Rolfe* proceeded. *Dixon* here is in that situation, and, like *Beresford*, has been released from that imperfect contract. There may even be circumstances in which after executing the deed of settlement the shareholder can insist on being released from liability: *Coleman's Case* (1). But here he has not executed it. The 7 & 8 Vict. c. 110, s. 3, expressly distinguishes between "a subscriber" as a person "who has not executed the deed of settlement" and a "shareholder" as a person "who has executed the deed of settlement," and many other sections in that statute recognise the distinction.

The application of the clauses in the deed of settlement and of the *Chippenham* agreement in this case came before the Court in *Belhaven's Case* (2). There the facts were less favourable to Lord *Belhaven* than they are here, but the Court held that Lord *Belhaven* was not to be considered a shareholder. Yet here Lord Justice *Giffard* has, notwithstanding the strong circumstances of this case, treated *Dixon* as a shareholder, and has held that he has not been released from liability as such. It is submitted that these facts, that the conditions on which alone he consented to accept shares were not complied with, that he never executed the deed of settlement, and that he never interfered in any way in the affairs of the company, were an answer to any pretence to treat *Dixon* as a shareholder; but that even if he had ever borne that character he had been duly released from it, and that the cancellation of his shares, well known to the shareholders by being published in the balance-sheet of the company, had been acquiesced in for years, an acquiescence which was binding on the company itself.

*In re Bowron, Baily's Case* (3), where an allotment of shares had been applied for and a deposit paid, the delay of the directors in performing what they had undertaken in their prospectus was held sufficient to release the allottee. And the case of *Meux's Executors* (4), shews that a company is bound by the conduct and statements of its agents and officers.

This matter really rests in contract, and therefore the lapse of

(1) 1 De G. J. & Sm. 495. *2813* (3) Law Rep. 3 Ch. Ap. 592.  
 (2) 3 De G. J. & Sm. 41. *572* (4) 2 De G. M. & G. 522.

six years after the cancelling of the shares is an answer to this claim. Of course there might be a difference if there had been a deed under seal duly executed; but here *Dixon* never executed the deed.

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Mr. *Southgate*, Q.C., and Mr. *F. W. Bush*, for the Respondent:—

There can be no question that *Dixon* was a shareholder. If so, the directors had no right to cancel his shares. Nothing had given them power to do that act, and there can be no acquiescence to validate an act which is entirely without authority. That he was and claimed to be a shareholder was proved by his execution of a proxy. That act was decisive of the character of his connection with the company. He does not in his own letter deny that he was a shareholder; he merely refers to the understanding between *Wilkie* and himself, and says: "I do not think that, under the circumstances, I can fairly be held a responsible shareholder." Yet he had applied for an allotment of shares, had signed a receipt for a dividend, and had appointed a proxy. There never was here, as in *Lord Belhaven's Case* (1) a real contest between the company and the party whether he had been in fact a shareholder. In this case that fact was too plain to be doubted. He claimed to be released by the act of the directors from his character of shareholder, but they never possessed the power so to release him. Even if the *Chippenham* arrangement could be treated as conferring on them such a power *Dixon* could not be said in any way whatever to come within the terms of that arrangement. He was neither at law with the company, so that the directors, to save the company from the expenses of litigation, might enter into a compromise with him, nor had he incurred a forfeiture of his shares by any violation of the terms of the deed of settlement, or, at all events, no forfeiture of his shares had been declared on that ground. One or the other of these things was shewn by Lord *Cranworth* in *Spackman v. Evans* (2) to be absolutely necessary to enable a shareholder to be, under the *Chippenham* arrangement, treated as released from liability. A shareholder was a partner, and could only be released from the partnership in accordance with the provisions of the deed of partnership. *Dixon's*

(1) 3 De. G. J. & Sm. 41.

(2) Law Rep. 3 H. L. 188.

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conduct shewed that he had accepted the shares; and when afterwards he wished to get rid of them he allowed delay to occur, and did not give the directors clear and express notice of his repudiation of them. He was bound by his acceptance of them, as the consignee of a cargo would have been: *Chapman v. Morton* (1). The doctrine there stated is amply confirmed by the cases quoted in *Lindley on Partnership* (2).

As to whether he was a shareholder or not, *Elkington's Case* (3) shews that the application for shares and an allotment of them are sufficient to constitute the applicant a shareholder. And this is so especially with regard to third persons whose conduct is likely to be affected by the belief that a particular person has become a shareholder in a particular company: *Davidson's Case* (4). It is so even with regard to persons who hold shares upon trust. In *Chapman and Barker's Case* (5) a person who held shares, though merely a trustee, was treated as liable as a shareholder to the creditors of the company, though what he paid to them he might ultimately recover against the company itself. Here *Dixon* might have a right as against *Wilkie*, but he was clearly liable to the company. As to *Belhaven's Case* (6), there was much argument in that case on the question whether he ever was a shareholder, and on that, which was a question of fact, the decision turned. That circumstance renders it inapplicable here. The facts here shew that *Dixon* assumed the character of a shareholder, and his delay after he knew that Parliament had not made the company one of limited liability, is an answer to his present claim for exemption. His own conduct has fixed the liability upon him, and the directors had no authority to declare his shares cancelled.

Sir *R. Baggallay* replied.

LORD WESTBURY:—

My Lords, this is an appeal from a decision of the Lord Justice *Giffard*, sitting alone on behalf of the Court, whereby he has ordered the Appellant's name to be put upon the list of the con-

(1) 11 M. & W. 534.

(2) Page 137.

(3) Law Rep. 2 Ch. Ap. 511.

(4) 3 De G. & Sm. 21.

(5) Law Rep. 3 Eq. 361.

(6) 3 De G. J. & Sm. 41.

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tributories of this company, and in doing so he discharged an order to the opposite effect made by the Master of the Rolls.

The company has been an unfortunate one. This is the fourth or fifth appeal which your Lordships have had to decide arising out of the affairs of this company. But there is this distinction between the present appeal and the former appeals, that in the former appeals there arose cases where the person who resisted being made a contributory, at the same time admitted that he had originally been a shareholder in the company. There was no contention in those cases as to a right to have the name withdrawn *ab initio* from the list of shareholders of the company. The present appeal resembles more, or, rather, falls within, the same class as, *Lord Belhaven's Case* (1), the contest here being, on the part of the Appellant, that he never was originally a shareholder in the company.

The grounds stated on the part of the Appellant in support of this appeal are three. He contends, first, that he entered into a conditional contract only to take shares in the company, that that condition was never fulfilled, and that, therefore, there never was a complete agreement on his part to become a shareholder. Secondly, he contends that if he did become a shareholder, or might have been required to complete his character of shareholder, a question arose between him and the company as to his right not to be regarded as a shareholder, and that this question was one which, under the deed of settlement, the directors had the power to compromise and to settle, and that they did *bonâ fide* compromise it; and that one of the terms of the compromise was, that his intended shares should be annulled or cancelled; that this was done *bonâ fide*, and he was thereby relieved from all obligation to the company. Thirdly, he has contended that inasmuch as his name ceased to be upon the register of shareholders from and after the year 1849; whereas the order for winding up this company was not made until the month of May, 1861, the intervening lapse of time, during which the register presented no trace of his being a shareholder and the contract for annulling his shares appeared in the books of the company, renders it unjust that the Court should

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(1) 3 De G. J. & Sm. 41. *11 June 18572.*



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now review that transaction and hold him to be a shareholder, and therefore a contributory to the company.

My Lords, I have mentioned these three grounds, not because I deemed it necessary to invite your Lordships' attention to all of them—for in my own judgment the second ground is the one on which it is desirable that your Lordships' judgment should be based—but I mention them for the purpose only of discriminating and laying them aside; giving no opinion with regard to the legal and true effect of the questions so raised by the first and third points of the case presented by the Appellant. Confining, then, our attention to the second point, namely, whether there was a power in the directors to compromise, and whether there was a *bonâ fide* settlement by compromise within the authority given to the directors of the company, it is necessary to state in a few words the facts of the case, about which there is no conflict of evidence or dispute between the parties.

Now, my Lords, it appears that this company having been formed in the year 1847, a gentleman of the name of *Wilkie* was, in the year 1848, the manager and general agent of the company in *Scotland*. The present Appellant appears to have been the owner or occupier of a large estate in *Scotland*, and to have been on friendly and intimate terms with Mr. *Wilkie*, the agent. By the deed it was contemplated that an extraordinary board, or board of extraordinary directors, should be formed for the management of the affairs of the company in *Scotland*; and the original application to the Appellant was made by Mr. *Wilkie* in a request that he would become one of the extraordinary directors. It likewise appears that Mr. *Wilkie* was desirous that the Appellant should be the holder of some few shares in the company; and it seems that, with the consent of the Appellant, Mr. *Wilkie* entered his name as the subscriber for ten shares in the company. The account given is this: that the Appellant, as it appears, objected to take shares in the company, inasmuch as there was at that time, according to law and the constitution of this company, no limit on the liability of the shareholders. The Appellant appears, therefore, to have said to Mr. *Wilkie*: "You may enter my name if you will give me this assurance, that until an Act of Parliament shall be obtained limiting the liability of the shareholders I shall not be

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required to do anything ; neither to pay anything nor to sign the deed of settlement ; and, in fact, that I shall not be a responsible shareholder until an Act of Parliament limiting the liability shall have been obtained." Mr. *Wilkie*, on that understanding, entered the name of the Appellant as a subscriber, and he was set down on the register of shareholders as the registered holder of ten shares.

Nothing appears to have been done by the Appellant for some time. We find, however, that he gave a proxy to Mr. *Wilkie*, that is, at Mr. *Wilkie's* request, to a gentleman of the name of *Fenton*, with reference to the appointment of the board of extraordinary directors. It seems also that on a dividend being declared by the company of trifling amount, the money was received by Mr. *Wilkie* ; but, apparently at the request of Mr. *Wilkie*, the Appellant signed the receipt. No difficulty seems to have arisen. He was never called upon to execute the deed of settlement, and no reluctance was manifested on the part of the Appellant until he received a call letter from the secretary of the company, desiring him to pay certain calls upon the ten shares which appeared to be standing in his name. To the first letter, it seems, he paid no attention, but upon a second letter coming with a second call, he appeals at once to Mr. *Wilkie* ; and the language of his appeal is very material, because he states in his letter to Mr. *Wilkie* the facts which had previously occurred, and appeals to Mr. *Wilkie* to interfere between him and the board of directors, and to relieve him from the position of shareholder. The language of the letter is material, because the question here arises, whether the Appellant represented his case as one on which he might fairly claim to have his name withdrawn from the list of shareholders. It does not matter, for the purpose of your Lordships' decision on this point, whether the Appellant's claim was in all respects fully justified by law if it had been then resisted. It is only material to shew that he urged legal grounds, or rather equitable grounds, for the purpose of having his name withdrawn from the subscription list, and that those grounds were in all respects in conformity with the facts. His language is most express. He tells Mr. *Wilkie* : " You will recollect at the time you put down my name, and paid a deposit, that you distinctly stated to me that you wanted my name for the purpose of appearing in a list of extra-

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ordinary directors in *Scotland*, when such should be advertised, and when an Act of incorporation was got, limiting the responsibility of the shareholders, and that until that was got you would not ask me to sign any contract, or consider me responsible as an ordinary shareholder." He then says: "I will be obliged if you will explain these circumstances to the board, if you have not done so already, and set the matter at rest. I may remind you that you put my name down and paid the deposit yourself, and you have never asked me to repay you the amount, whatever it is. I wish well to the company, and have uniformly insured my stock with it, but I do not think, under the circumstances, I can fairly be held a responsible shareholder." Now, that is a very distinct statement that there was no final concluded agreement, that he had depended upon a certain assurance being fulfilled as to the shareholders' responsibility, and that he had agreed to take shares when that assurance was fulfilled, and not till then. It is a statement, therefore, clearly and distinctly of an equitable right to have what had been done by Mr. *Wilkie* undone, because the assent of the Appellant was founded absolutely upon the condition that a limited responsibility should be attached to the shareholders in this company before he would consent to become a shareholder therein.

Mr. *Wilkie* appears to have acted in a very straightforward manner, and at once to have communicated with the board of directors, and he tells that board the facts of the case almost in the same terms. In his letter of the 2nd of March, he says: "This gentleman's name appears in the list of shareholders, but as he considers he is not properly so, it is necessary for me to explain how he stands. For this purpose I enclose you a copy of a letter he wrote me after the bill was withdrawn from Parliament. This letter I had before me while attending our general meeting in the beginning of November last." That was a meeting of great importance, in which the shareholders were gathered together with a view of considering the terms of the proposed agreement by which some shareholders should be permitted to withdraw. He then apologizes for not having, through forgetfulness, produced the Appellant's letter on that occasion. He says distinctly: "I cannot deny what Mr. *Dixon* states as the terms upon which he allowed me to retain his name as a shareholder on the list. I have never

asked him to repay me the deposit, and did not consider myself entitled to do so until we got an Act limiting the shareholders' responsibility. It was on this condition that I obtained his consent to allow his name to remain after I had put it down, and from this also that I did not receive his signature to the deed of agreement." By that I suppose he means the deed of settlement of the company.

Now it being the essence of a transaction of this kind that there should be a complete contract by the shareholder to take shares, there certainly never was, in that sense, a contract by this gentleman. But it is not material to consider that, with a view to deciding this case. It is material only to consider whether this gentleman had not fair and reasonable grounds, and has not stated here fair and reasonable grounds, for being relieved from the engagement into which, through the agency of Mr. *Wilkie*, he was made to enter.

My Lords, the directors, on the other hand, by their secretary, appear to have drawn a distinction between liability in law and liability in equity, and to have considered that this gentleman was liable in law to pay the calls; and they therefore said: We will commence an action against you for these calls unless they are paid. There was a repetition, therefore, of the application to the directors, and that was farther confirmed by a representation of Mr. *Wilkie*, who, in addition to the equity of the claims of the Appellant, urged this, that it would be expedient for the company to give way to the claim of exemption, because otherwise the agency of Mr. *Wilkie* in obtaining farther shareholders in the company would be exceedingly limited, and his credit with people in general would be very much impaired, if the promise he gave to the Appellant was disallowed and refused to be performed by the company.

Under these circumstances, those terms were agreed upon—that £40 should be paid, being the amount of the calls that had hitherto accrued due upon the ten shares, entered in the name of the Appellant, and that thereupon the shares should be cancelled. Now, my Lords, we must recollect that this agreement was come to by the directors of a company which was then in full currency and operation. It was a concern the benefit of which depended

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undoubtedly upon its being carried on without any transaction that might justify complaint and discredit being cast upon the company. The question is, whether this agreement was not within the power of the directors? I should be almost inclined to think that they would have such a power without the necessity of seeking any distinct authority beyond their deed of settlement. But it is unnecessary to press that, because there is a distinct authority in the deed of settlement, which is directly applicable, as I read and construe it, to the case before your Lordships. By the 164th section (1) (I read it shortly), it is declared that it shall be lawful for the board of directors to discharge any debts or claims owing by or made against the company upon any evidence they shall think proper, and to enter into or make any compromise or composition with respect to any claims made against or owing to the company.

Now, my Lords, here is a case in which the directors were asserting their title to receive a sum of money from the Appellant, and to hold and bind him to it as being on the list of shareholders. On the other side, the Appellant was in the condition of a man who could say, and did say, I have been led into permitting my name to be used by your agent on his distinct assurance, upon a precedent condition, which, whilst it remained unfulfilled, would prevent any contract arising between me and you. That there was that condition your agent himself testifies. That it has not been fulfilled is, of course, a thing well known. Therefore no contract has arisen between us, and you have no right to place your hand upon me. In that state of things, the case certainly comes within the express meaning of the words of the clause I have read.

In dealing with a compromise, always supposing it to be a thing that is within the power of each party, if honestly done, all that a Court of justice has to do is to ascertain that the claim or the representation on the one side is *bonâ fide* and truly made, and that on the other side, the answer, or defence, or counter claim, is also *bonâ fide* and truly made. I mean by *bona fides*, the truth of parties, and above all this, that the compromise is not a sham, or an instrument to accomplish or to carry into effect any ulterior or

(1) See the observations of Lord *Cranworth* upon this section of the deed of settlement in *Spackman v. Evans*, Law Rep. 3 H. L. 188.

collateral purpose, but that the thing sought to be done is within the very terms of the compromise—that all that the parties contemplate and desire to effect and to deal with is, whether the claim on the one side or the defence on the other side shall be admitted or not; or whether, if both things are *bonâ fide* brought forward, there may not be some concession on the one side, and some concession on the other side, so as to arrive at terms of agreement, which, if honestly made, is an honest settlement of an existing dispute. That is the characteristic of a compromise, and if it be not manifestly *ultrâ vires* of the parties, it is one that a Court of justice ought to respect, and ought not to permit to be questioned.

My Lords, I find all those elements in this case. I think there have been great truth, great sincerity, and great fairness, on the part of the Appellant. On the part of the agent of the company also there have been great candour, great truth, and great sincerity in meeting the claim made by the Appellant. There is not the remotest suspicion of any collusion between the two. There is not the remotest hint, or ground for believing, that it was to accomplish any ulterior purpose that this was done; and there is not, so far as I can see, any other mode by which the directors could carry this into effect than the mode which they adopted of cancelling and of annulling, I will not say the shares, but the contract, or, rather, the apparent contract, which was on the books of the company, but which in reality never was made or entered into.

I think, therefore, that this case stands wholly independent of those cases which have been decided. *Lord Belhaven's Case* is a much stronger case than anything that I ask your Lordships to decide now. How the decision in *Lord Belhaven's Case* was arrived at, it is not necessary to inquire; but undoubtedly if Lord *Belhaven* was justly relieved from a deliberate contract which he entered into, and which was perfected, there is much greater reason for relieving the Appellant from the completion of a conditional contract which he was induced to enter into, and which as the condition was not performed, in law and in fact never became a binding contract.

My Lords, under these circumstances, although you would be slow to encourage persons to come here, after a winding-up order has been made, to bring forward claims which they might have

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brought forward but did not, during the currency of the company, yet there can be no reason in the world why you should hesitate to give effect to a just, a reasonable, and a truthful agreement, *bonâ fide* entered into many years before it was contemplated or supposed that this company would be reduced to insolvency, and would become the subject of a winding-up order. That is the case in the present instance. I think it is very much to be regretted that the order was made, and your Lordships, I think, will not hesitate about discharging that order. Therefore we must, I submit to your Lordships, reverse the order of the Lord Justice, and in lieu thereof direct that the petition of appeal presented to the Lord Justice be dismissed, and dismissed with costs.

My Lords, I regret very much that we do not adopt the very wholesome rule of giving the Appellant who succeeds the costs of the appeal to this House. It is very often a sort of defeat when the Appellant succeeds after a long litigation. I should be very glad if your Lordships could bring this case within an amended rule, but if you think you cannot do so by reason of the novelty of the proceeding, then all that we can do is to make an order dismissing the appeal below, giving the Appellant his costs before the Lord Justice. I think he had his costs before the Master of the Rolls.

With regard to the official liquidator, who has done his duty and no more than his duty, and whose counsel have very ably stated his case for the benefit of those who are absent, he will be entitled to have his costs of this appeal, and of course the costs of the proceedings below, out of the estate.

LORD COLONSAY entirely concurred.

LORD CAIRNS :—

My Lords, it is quite clear that the late Lord Justice *Giffard* (whose name I cannot mention without at the same time expressing my deep sense of the great loss which the country has sustained by being deprived of his most judicial mind) would have been very glad if he could have seen his way to affirm the decision of the Master of the Rolls in this case. But the Lord Justice thought that he was hampered by some of the decisions which had been

arrived at in the case of this company, and was prevented by those decisions from upholding the order made below.

My Lords, I cannot agree in that view of the case. I think that there is none of the decisions which will in any way be infringed upon by the order which my noble and learned friend has proposed to your Lordships to make.

My Lords, I view this case as an extremely simple one. I am disposed to hold that after what took place in the year 1847, Mr. *Dixon* was undoubtedly a shareholder in the company, and if in that state of things, there had come a winding-up of the company, such as has now taken place, it may very well be that in that position he would have ranked as a shareholder and contributory under the winding-up, and that there would have been no means of altering that position. That might have been so at that time. But, my Lords, it appears perfectly plain (without going through the narrative, which has been exhausted by my noble and learned friend), upon the testimony of Mr. *Dixon*, and upon the evidence of Mr. *Wilkie*, the agent, which we have through the medium of his letters, that Mr. *Wilkie* obtained the consent or the acquiescence of Mr. *Dixon* to his assuming the position of a shareholder upon a distinct promise that the company would obtain an Act of Parliament limiting the liability of the shareholders, and that until that was done, the company would either exact no payment or liability from Mr. *Dixon*, or would hold him harmless against any such payment or liability. That state of things went on for some time. Mr. *Dixon* executed a proxy and signed a receipt as for a small sum paid by way of dividend. Neither of those acts was, in my judgment, inconsistent with the state of facts to which I have in the first place referred. In the course of the year 1848, it appears that the company made an effort to obtain an Act of Parliament, but the effort failed. In that same year two successive applications were made to Mr. *Dixon* for payment of calls, in the latter instance proceedings were threatened. He then appealed to Mr. *Wilkie*. The promised Act of Parliament not having been obtained, he reminded Mr. *Wilkie* of the agreement which had been come to, and he requested Mr. *Wilkie*, not as a matter personal between himself and Mr. *Wilkie*, to hold him harmless, but to state the

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facts to the directors, and to call upon them to act according to the agreement which had been entered into between himself and Mr. *Wilkie*. After a little accidental delay of a few months, Mr. *Wilkie* took that course; he forwarded the letter to the agent of the company in *London* requesting him to call to it the attention of the directors, and confirming and enforcing every word that Mr. *Dixon* had said. It was accordingly called to the attention of the directors. Mr. *Wilkie*, in a subsequent letter, pressed upon them how important it was that it should not be noised abroad in *Scotland* that the directors were unwilling to act upon the representations made by their authorized agent in *Scotland*; and this had such an effect upon the directors that they authorized their secretary to communicate to Mr. *Wilkie* that, upon the payment of the call of £4 per share, Mr. *Dixon* would be relieved from liability, and his shares would be cancelled.

Now it is not necessary for your Lordships narrowly to scrutinise what would have been your decision if this case had been presented to your Lordships for judgment at that time. It is quite sufficient for me to say that there were, in this state of circumstances, the elements of a fair compromise of a disputed right. There was a very plausible ground for contending, certainly in justice, and very probably in equity, that if Mr. *Dixon* had at that time gone to his legal adviser, his legal adviser would have recommended him to take steps which would have resulted in a successful claim as against the company to take his shares in some way off his hands, or to indemnify him against any liability which he might lie under to outside creditors in respect of those shares. But I repeat, without scrutinising whether that would have been the decision arrived at or not, it appears to me it was a fair case to urge on the part of Mr. *Dixon*, and a fair case for compromise on the part of the directors. And, my Lords, I do not think it was the less a fair case for compromise because the matter had not gone to the length of a letter from his solicitor or legal agent, and because upon the mere representation being made to the directors they saw the justice of what was demanded, and, without much correspondence, agreed to the arrangement that was proposed. — Beyond all doubt the directors had authority to compro-

mise, and if your Lordships are satisfied, as certainly I am satisfied, that there was here a case containing all the elements for a compromise, and that the compromise was entered into *bonâ fide*, truthfully, and really, not for any sinister object, or for the purpose of disguising under the name of a compromise a different transaction, one *ultrâ vires* of the directors; if, I say, your Lordships are satisfied of this, as I certainly am satisfied, your Lordships have, as it appears to me, ample ground for holding that that compromise should not, after this lapse of time, be disturbed. I therefore entirely agree with what has been proposed, namely, that the order made at the Rolls should be restored, and that Mr. *Dixon's* name should be taken off the list of contributories.

My Lords, as to costs, I quite agree with what has been said by my noble and learned friend. I am sorry to say that these victories in your Lordships' house are often accompanied with an amount of cost to the successful party which is very much to be lamented. The only way in which the Appellant here could be indemnified would be by giving him his costs of appeal out of the estate; but as it appears to me that that has not been done, so far as I am aware, on any other occasion under the Winding-up Acts, and however wholesome such a practice might be, I think it would be dangerous for your Lordships to adopt it on this occasion. I think that all that your Lordships can properly do in this case is to hold that the Appellant should have his costs of appeal before the Lord Justice, and that nothing should be said with regard to the costs of this appeal, except that the official liquidator should have his costs out of the estate.

Ordered that the order of Lord Justice *Giffard*, of the 5th of November, 1869, be reversed; that the appeal upon which the said order was made be dismissed; and that the costs of *Dixon* and of the official manager, in respect of the said appeal, be paid out of the assets of the company: And that the order of the Master of the Rolls of the 26th of July, 1869, ordering that the name of the Appellant be removed from the list of contributories, and that the costs of *Dixon*, of the said official manager and of the creditors' representative, in respect of the application

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upon which the said order of the Master of the Rolls was founded, be paid out of the assets of the company, be affirmed: And that the costs incurred by the said official manager in respect of this appeal to this House be paid to him out of the assets of the said company: And that the cause be remitted to the Court of Chancery to do therein as shall be consistent with this judgment.

*Lords' Journals, 10th May, 1872.*

Solicitors for the Appellant: *Kingsford & Dorman.*

Solicitors for the Respondent: *Horn & Murray.*

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THE MARINE INVESTMENT COMPANY } APPELLANTS;  
 AND COFFEY AND OTHERS . . . }

AND

T. SNAITH HAVISIDE AND W. CRIBB . . . RESPONDENTS.

*Stamp—Secondary Evidence of a Document.*

The burden of proving an instrument to be unstamped lies, in the first instance, on the party who objects to its production on the ground that it is unstamped. Where there is no evidence on either side it will be presumed to have been stamped.

But when once satisfactory evidence has been given that at a particular time the instrument was unstamped, there is an end of any presumption of law in favour of its having been stamped, the onus of proof is shifted, and the party who relies on the instrument must prove it to have been duly stamped.

THIS was an appeal against an order of Lord Chancellor *Hatherley*, dated the 21st of December, 1870, by which a decree of Vice-Chancellor *James*, dated in January, 1870, had been reversed.

In the year 1859 one *Robert Taylerson* was the owner of letters patent for an invention for improvements in shipbuilding, and he was also the owner in fee of a shipbuilding yard and premises situated at *Ladyburn*, near *Greenock*, in *Scotland*. By a bond and disposition executed in the Scotch form dated the 13th of May, 1859, and registered in the Registry of Sasines for *Renfrewshire*

and the Regality of *Glasgow*, this property was mortgaged to a person named *Bourne* to secure a sum of £3000, the unpaid balance of the purchase-money agreed to be given for it, the original sum having been £4000 and only £1000 having been paid. The sum for which the mortgage was executed was to bear interest at 5 per cent.

By a like bond and disposition of security executed in the Scotch form, dated the 22nd of June, 1859, and registered the 5th of July, 1859, *Taylerson* bound himself to repay to the Respondent, *Thomas Snaith Haviside*, a sum of £1150 with interest, and mortgaged the same premises to secure payment of this debt.

By an agreement dated the 2nd of September, 1859, after taking credit for the value of a ship then assigned to *Haviside*, *Taylerson* acknowledged himself indebted to *Haviside* in a sum of £4350, in addition to the £1150 already mentioned.

By a bond and disposition of the same date *Taylerson* secured upon his shipbuilding yard the sums thus acknowledged to be due.

By an indenture dated the 20th of November, 1859, *Taylerson* mortgaged the patent to *Haviside* for £1000.

In the year 1862 one *William Cribb* was proposed to become a partner of *Taylerson*. Negotiations were pending for some time on this scheme of partnership, and it was alleged that for the benefit of *Taylerson* (on account of friendship for him) *Haviside* had written a letter consenting to release his mortgage on the premises at *Ladyburn*, that being one of the inducements for *Cribb* to enter into partnership with *Taylerson*.

*Cribb* did enter into the partnership, quitted it in about a year, and then *Gething*, *Cribb*'s solicitor, handed over to *Sutton*, who succeeded *Cribb* in the partnership, the letter said to contain the undertaking.

In April, 1864, the *Marine Investment Company* advanced certain sums of money to the partnership of *Taylerson & Sutton*, and it was agreed that the title deeds of the shipbuilding yard and premises at *Ladyburn* should be deposited as collateral security for these advances. *Taylerson & Sutton* when agreeing to this arrangement informed the solicitors of the company that the property was mortgaged to the extent of £3000 to Mr. *Holden*, who held the title

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deeds as assignee of *Bourne*, the original mortgagee. It was arranged that this mortgage should be paid off out of the moneys advanced by the company, and the deeds were to be handed over to the company. This was done, the company being assured that there was no other charge upon the premises, and by a disposition in the Scotch form *Taylerson*, on the 6th of July, 1864, assigned the shipbuilding yard and premises at *Ladyburn* irredeemably to *Coffey* and others, the trustees of the *Marine Investment Company*.

In November, 1864, *Taylerson* became bankrupt. In investigating the title to the shipbuilding yard and premises upon some proceedings consequent on this bankruptcy, the solicitors for the *Marine Investment Company* searched the Register of Sasines for the county of *Renfrew*, and by means thereof discovered the mortgages to *Haviside* there recorded. *Sutton* and the other parties being told of this, declared that the premises were in fact unincumbered, for that Mr. *Haviside* would, of course, act on the undertaking he had given, and release the mortgage. A search was made for the letter said to constitute this undertaking, but it could not be found, nor could any one swear to its contents, nor was there any known copy of it. *Haviside* denied that he had entered into any absolute undertaking to release the mortgage, averred that it was an undertaking conditional on *Cribb* executing a charge on the shipbuilding yard, which condition had never been performed; and farther, that the undertaking was delivered to *Cribb* unstamped.

On the 19th of June, 1866, a bill was filed by the *Marine Investment Company* and *Coffey* and others against *Haviside* and *Cribb*, praying that a proper release might be decreed to be executed by *Haviside*, and that he and *Cribb* might be decreed to do and concur in all necessary acts and deeds for the purpose of having the entry in the Registry of Deeds in *Scotland* vacated, the *Marine Investment Company* being willing to pay the expense thereof; that proper inquiries might be made; that *Haviside* might be restrained from transferring the mortgage debt; and for general relief. Answers were put in, *Haviside* denying any positive undertaking to release, and alleging that all that he had proposed to do was for the benefit of *Taylerson* and not of his creditors, and insisting that the alleged letter of undertaking should be produced.

*Sutton* died in 1868.

In the course of the evidence given in the cause, Mr. *Gething* the solicitor to *Cribb*, and afterwards the solicitor to *Sutton*, said: "I cannot remember anything as to the contents of the undertaking which I handed to Mr. *Sutton*. I am sure that it was not stamped while in my possession."

The Plaintiffs (the *Marine Investment Company* and *Coffey* and others the trustees) put in among other evidence the bills of costs of *Havaside's* solicitors (Messrs. *Howard & Dollman*) of February, 1863, in which were these (among other) entries:

"Drawing undertaking to be given by Mr. *Havaside* to release mortgage on premises at *Ladyburne*, and copy."

"Attending Mr. *Havaside*, obtaining and attesting his execution of assignment and signature to undertaking."

"Attending completion."

"Attending stamping duplicate assignment."

From which evidence, and the belief of some witnesses that with the assignment of the patent there had been an unconditional undertaking to release the mortgage, the right to relief was insisted on.

The cause came on for hearing before Vice-Chancellor *James* on the 28th of January, 1870, when, in addition to evidence of the conduct of the parties and proofs of the bills of costs of the attorneys and solicitors, secondary evidence of the contents of the alleged letter of undertaking was tendered. It was objected that the letter itself was not produced; that if produced it would be found to be unstamped, and that consequently as it could not itself be admissible, it was not competent for the Plaintiffs to give secondary evidence of its contents. The Vice-Chancellor thought that on the whole evidence there was enough to shew that the alleged undertaking had been given, and, adopting the representation that it was an absolute undertaking to release, he made a decree directing the execution of a release as prayed. On appeal to Lord Chancellor *Hatherley* the decree was ordered to be reversed. This appeal was then brought.

Mr. *Edward E. Kay*, Q.C., and Mr. *W. W. Karlake*, for the Appellants:—

There had been here a simple undertaking to release the mort-

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gage, and the question was, whether that was not sufficiently proved, or whether, as the letter containing the release had been lost, it was not competent to the Appellants to give secondary evidence of it. It is not denied that **an** instrument of that sort must be stamped. But, when the objection that it is not stamped is made, the onus of proving that objection lies in the first place on the objector. That onus was not here discharged by him. All the presumptions from the evidence of the conduct of the parties were the other way. The document was proved to have been given, and to have passed from one person to another, each being interested in seeing that it was a valid and effectual instrument. The paper was delivered to *Cribb* in February, 1863, and he held it while he continued in the partnership. He quitted the partnership in February, 1864, and was succeeded by *Sutton*, to whom *Cribb* or his solicitor *Gething* handed over the letter. Mr. *Gething's* statement amounts to no more than that he did not recollect getting it stamped while it was in his possession. It might have been stamped before. That is the proper meaning to be affixed to his words. But all the proceedings from that time forward shewed the belief of the various parties that the release was valid and could be enforced. If, therefore, it was not stamped by *Gething* while in his possession it must have been stamped after it got into the possession of *Sutton*. There were in the bill of costs of *Haviside's* own solicitor two entries which shewed that the document had been duly executed [see *ante*, p. 627.] The instruments there mentioned had been completed, and then this instrument had been handed over to the parties interested, and was held by them during the continuance of their interest. There could not be stronger grounds of presumption for the belief that the instrument thus properly executed was put by them into a perfectly legal and formal state, and was in all respects valid. The statement of *Haviside* in his answering affidavit, "I believe that such letter was not stamped," cannot for one moment be set up against such a presumption.

Then what is the state of the authorities on the subject? The first case is that of *Rex v. Long Buckby* (1), where parties having

(1) 7 East, 45.

acted for years on the belief that certain indentures of apprenticeship were valid, the Court adopted the presumption that they had been properly stamped, although evidence was actually given that no proof of the stamping could be found in the records of the Stamp Office. In *Rippiner v. Wright* (1) an agreement had been reduced into writing on paper shewn at that time to be unstamped. On a subsequent occasion it was snatched by the Plaintiff from the hand of the Defendant's attorney; it was afterwards destroyed, and there, no doubt, the Court refused to receive secondary evidence of it; but that was because at the time it was snatched from the hands of the attorney it was known not to be stamped, and it was then in the hands of a man whose interest it was that it should not be stamped. That case, therefore, could not affect the present. But in *Pooley v. Goodwin* (2) a written paper authorizing the payment of a sum of money had been given and had been lost; but the Defendant having in his own affidavit set out the order itself, secondary evidence of it was allowed, as the Court presumed that the stamp had been properly affixed to it. So in *Hart v. Hart* (3) it was held that where secondary evidence is admitted to prove the contents of a lost instrument, the Court will presume it have been properly stamped until the contrary is shewn. And *Phillips' Evidence* (4) adopts the principle there acted on. In *Smith v. Henley* (5) the document had been returned to the hands of the man who did not like and did not wish to be bound by it, and he destroyed it, and there evidence had been given which shewed that at the time it got back to his hands it was not stamped. There, of course, no ground existed for the presumption that he who wished to get rid of it would make it a valid instrument; but here the presumption was the reverse, for it was in the hands of men whose interests were to be protected by it, and who would therefore take care that it was valid. In *Crowther v. Solomons* (6) the person who produced the copy admitted that the original was not stamped, otherwise it was said the ordinary

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(1) 2 B. & Ald. 478. See *Rex v. Castle Morton*, 3 B. & Ald. 588.

(2) 4 Ad. & E. 94. See *Doe d. Fryer v. Coombs*, 3 Q. B. 687.

(3) 1 Hare, 1.

(4) 8th Ed. vol. ii. p. 623.

(5) 1 Phill. 391.

(6) 6 C. B. 758.



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presumption that it was stamped would have arisen. In *Closmadeuc v. Carrel* (1) it was said that the general rule in favour of the presumption that the instrument was stamped could not be disputed. Here the evidence to support that presumption was very strong, for it was *Sutton's* interest to get it stamped, and from the beginning to the end he acted on the faith of its being a valid and effectual instrument.

Sir *R. Palmer*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Speed*, were for the Respondent, but were not called on.

LORD CAIRNS (2):—

My Lords, in this case the bill is filed, in substance, for the specific performance of an agreement to release a certain ship-building property on the *Clyde* from a mortgage over the property, to which the Respondent *Haviside* was entitled; and two objections are made to the relief sought by the present Appellants. The agreement which is founded upon was constituted by a letter, dated the 24th of February, 1863, and the letter is lost. The first objection is this: It is said that the letter was not stamped. And the second objection is, that the terms of the letter are not proved, and that they were not the terms which are alleged by the Plaintiffs' bill. My Lords, the first of these objections has to be disposed of in its proper order; and it will be unnecessary, as it seems to me, and as I shall ask your Lordships to hold, to consider the second question, having regard to the nature of the answer which must be given to the first.

Now, it is not for your Lordships, at this time, to consider whether the fiscal law with regard to the stamping of lost instruments is in the most satisfactory state possible, or not. It is said that if an instrument be lost, and if a copy of it can be produced, or if the words of the instrument are so accurately remembered that they can be set down in writing, the copy in writing can be taken to the Stamp Office, and on the payment of the proper penalty it may be stamped. But if there is no copy, and the words cannot be set down in writing, no penalty can be received

(1) 18 C. B. 36. *29m 28474* of the Lord Chancellor, Lord Cairns  
 (2) The appeal being from a decision first addressed the House.

and no stamp affixed. I repeat, assuming that to be so, it is not for your Lordships now to consider whether that state of the law should be amended. It is for this House, at this time, simply to administer the law.

My Lords, the law with regard to the presumption to be made as to the stamping of lost instruments appears to me to be stated correctly in a sentence in the book of Mr. *Taylor* on Evidence, in which all the authorities which have been referred to to-day are collected. Mr. *Taylor* says (1): "If secondary evidence is tendered to prove the contents of an instrument which is, either lost, or retained by the opposite party after notice to produce it, the Court will presume that the original was duly stamped unless some evidence to the contrary be given." The cases which have been referred to at the Bar are here collected in a foot-note. They are *Hart v. Hart* (2), *Crowther v. Solomons* (3), *Pooley v. Goodwin* (4), *Rex v. Long Buckby* (5), and *Olosmadeuc v. Carrel* (6).

Now, my Lords, I take it to be clear that if an instrument is lost, and if there should be no evidence given respecting it on one side or the other, the presumption which ought always to be made, and which always would be made by the Court, would be that the instrument was properly stamped. There is no reason for the Court to adopt any other conclusion, and that is the conclusion that would be adopted. The facts, however, of this case are these:—The letter which is founded upon by the Plaintiff was dated the 24th of February, 1863. It was written, for there is no doubt there was such a letter, and it was handed over upon the occasion of the formation of a partnership as to the shipbuilding premises between Mr. *Taylorson*, the original owner, and Mr. *Cribb*. It is said that Mr. *Cribb* would not have entered into the partnership unless that letter had been written and handed over. Mr. *Cribb* continued in the business until the month of February, 1864. As to what passed at the time the letter was written, the evidence of Mr. *Dollman*, the solicitor of Mr. *Haviside*, who gave the letter, is this, he says: "I have examined the books of my late firm, and I cannot find any entry, charge, or disbursement

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(1) "On Evidence," 4th Ed. p. 153.

(2) 1 Hare, 1.

(3) 6 C. B. 758.

(4) 4 Ad. & E. 94.

(5) 7 East, 45.

(6) 18 C. B. 36.

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relating to the stamping of any such undertaking; and I verily believe that the same (if given) was not stamped at the time it was delivered to the said Messrs. *Keighley & Gething* as aforesaid." But Mr. *Gething*, who was the solicitor of Mr. *Cribb*, the person for whose benefit the letter was written, says what is still stronger. He says: "As to what was to be done by Mr. *Haviside*, I cannot remember anything as to the contents of the undertaking which I handed over to Mr. *Sutton*. I am sure that it was not stamped while in my possession." I do not pause to consider a suggestion that was made that that might mean that no stamp was put on it during the time it was in the witness's possession, whereas it might have been stamped before it was in his possession. The witness was not cross-examined upon that subject; and I think the words must be taken according to their natural meaning, namely, that it had been an unstamped document all the time that it was in the possession of Mr. *Cribb*, and when Mr. *Gething* handed it over to Mr. *Sutton*. It remained in his possession during the whole time that Mr. *Cribb* was a member of this partnership. As I have said, the letter was for the benefit of Mr. *Cribb*. Mr. *Cribb* was the person interested in having it stamped; and yet it is clearly shewn in evidence that, during all that period at least, Mr. *Cribb* did not have the letter stamped.

Mr. *Cribb* retired from the partnership in February, 1864; and a Mr. *Sutton* took his place, and became from that time Mr. *Taylorson's* partner. It was, of course, for the benefit of Mr. *Sutton* that this letter, if it was of the character that is alleged, should be handed over to him, and be preserved by him. Mr. *Gething* appears to have been not only the solicitor of Mr. *Cribb* but also of Mr. *Sutton*, and he states that he continued to be the solicitor of Mr. *Sutton* in the matter of this particular property (which is called the *Ladyburn* property), after Mr. *Sutton* had become a partner down to the time of Mr. *Sutton's* death. Mr. *Gething* farther states that the letter remained in his possession for some months after the new partnership between *Sutton* and *Taylorson* was formed, and that then he, the solicitor of Mr. *Sutton*, handed over the letter, still unstamped, to Mr. *Sutton*. And Mr. *Gething* does not suggest that, continuing as he did, to be the solicitor of Mr. *Sutton* down to the time of Mr. *Sutton's* death,

he, at any time, knew or heard of the stamping of the document. When the document was lost we do not know. It may have been lost immediately after it was handed over to Mr. *Sutton*, or it may have continued in Mr. *Sutton's* possession for some time after, and have been lost either before or after the time of his death. As to that there is no evidence whatever. Farther than that, it does not appear that, while in the possession of Mr. *Sutton*, this document was ever in any way used or produced or acted upon by Mr. *Sutton*.

Mr. *Sutton*, and his partner Mr. *Taylerson*, had occasion in the month of June, 1864, to apply to the banking company, now represented by the Appellants, and to ask for a loan of money. They obtained that loan of money upon a deposit of the title deeds of the *Ladyburn* property. They appear to have stated to the bankers that the *Ladyburn* property was unincumbered, except by an earlier mortgage, which was paid off on the occasion of the loan. But it is not suggested that the bankers ever knew of the mortgage or mortgages possessed by Mr. *Havaside* over the *Ladyburn* property; much less that they knew that any letter of the kind alleged had been given by Mr. *Havaside* with regard to this mortgage, or that that letter was in any way produced to the bankers. It does not appear, therefore, that Mr. *Sutton* during his life ever used or produced this document.

My Lords, in that state of things it appears to me that it becomes a question of evidence—a question of the just and fair inference to be drawn from the facts. This is not a case in which, there being no evidence on either side, your Lordships would presume, according to the well known rule of law, that the instrument was stamped. It is a case in which evidence, and a considerable body of evidence, is produced by those who maintain that the instrument was unstamped—and the question is whether that body of evidence so produced is rebutted by those who claim under the instrument, and is displaced as regards the question of fact. [His Lordship went through the evidence on this point very fully.] In this case there was no evidence, as in one of the cases cited in argument, *Closmadeuc v. Carrel* (1), to shew an attempt to get the letter stamped. But unless it be the law that after a



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party has proved that an instrument was unstamped on its execution, and continued unstamped for a considerable time after its execution—unless, I say, it be the law that in such a case the mere possibility that it might have been stamped at a subsequent period is, without more, sufficient, it seems to me your Lordships should hold that in this case there is evidence demonstrating that, down to the time to which I have referred, the instrument was unstamped; and there being no evidence to lead us to believe that it was stamped at any time subsequently, the just conclusion is, and must be, that it continued to be, as it was at the beginning, an instrument unstamped.

My Lords, it is always in some sense a disagreeable, and sometimes an invidious, thing to hold that a case should fail for want of a stamp being affixed to an instrument; and there are cases in which such a result, arising from accident, must be regarded with painful regret. In this case it does so happen, that if there is a failure in the relief to which the Appellants would otherwise be entitled, they have no one but themselves to blame for it. If the bankers, at the time they were applied to in 1864 for that loan of money, had done what bankers reasonably should have done, if they had made due inquiry with reference to this property situate in *Scotland*, subject to Scotch law, and governed by the principles of Scotch registration, they would have found upon the register the mortgage of *Haviside*, and the finding of that mortgage upon the register would immediately have led them to apply to Mr. *Sutton* and his partner for explanation. The whole matter was then fresh. If the view of the Appellants as to the contents of this instrument is correct, the instrument would then have been produced, and its production would have led to the release of these mortgages. The bankers did not take that step, and the result has been, that when the difficulty arose, the instrument was lost, and no stamp could be affixed to it.

My Lords, under these circumstances, it appears to me that the first objection which is made to this instrument is a fatal one, and that it is altogether unnecessary to consider the other question. I submit to your Lordships, for the reasons I have stated, that this appeal should be dismissed; and I see no reason for advising your Lordships otherwise than that it should be dismissed with costs.

LORD COLONSAY concurred.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, I entertain the same view which has been already so clearly and fully expressed by my noble and learned friend who has advised your Lordships upon this case. The way in which this difficulty has occurred is one in which it often does occur, that the matter was not supposed to be of importance. This is a case in which, of all others, we should most strongly have presumed that the document would have been stamped, if there had not been evidence to the contrary; it must be simply through the neglect of the parties that the stamping was omitted to be done. There is, however, evidence that it was not stamped for a long period—in fact, up to the time when it is traced to the custody of Mr. *Sutton*, in whose hands it was placed: after that we know nothing more of it. It appears that the same gentleman who acted as solicitor to the person who received the document, continued so to act for some years; and if it had been stamped, would most likely have had knowledge of the fact. I think the authorities go to this extent, that when once you have proved the absence or loss of the stamp the onus is shifted, and the question must be left to the jury upon the evidence that is produced. And if no evidence is produced, then, whatever the consequences may be, you are obliged to retain the conviction that the document was unstamped. And in this case, there being no evidence whatever of the document being stamped, there is nothing to lead us to the inference that it was ever stamped, I entirely agree with the motion of my noble and learned friend.

*Order appealed from affirmed, and appeal dismissed with costs.*

*Lords' Journals*, 6th June, 1872.

Solicitors for the Appellants: *Kimber & Ellis*.

Solicitors for the Respondents: *Wilkins, Blyth, & Marsland*.

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GEORGE OSGOOD . . . . . PLAINTIFF IN ERROR;

AND

THOMAS JAMES NELSON . . . DEFENDANT IN ERROR.

*Corporate Office—Inquiry by Committee—Hearing of Parties—County Court Acts—"Reasonable"—"Just."*

Though a corporation may have by statute a power to remove one of its officers holding a freehold office, the Court of Queen's Bench will see that that power is exercised in a lawful manner, and will interfere if it should not be so. But if exercised in a lawful manner that Court will refuse to interfere on the mere ground that the power has not been wisely or discreetly put in force in the particular case.

In the case of removal from office of an officer of the corporation, upon an accusation of inability or neglect of duty, if there has been such evidence given as in an ordinary trial would justify the Judge in leaving it to a jury to say, as a matter of fact, whether the accusation was made out, the Court will not interfere with the decision arrived at by the corporation.

A corporate body having the power to dismiss one of its officers, holding a freehold office, on complaint against him, referred to a committee of its own body the task of examining into the complaint, and receiving evidence upon it, and reporting thereon. The committee performed this duty. The report and evidence were duly furnished to the inculpated officer, who was then called on for his defence. He was afforded the opportunity of being heard, and counsel was heard for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office:—

*Held*, that this was not a case of delegation of lawful authority, but was a due exercise of that authority by the corporate body itself.

*Per* LORD COLONSAY :—The proceedings in this case were not to be assimilated to a criminal proceeding, but were to be treated in the nature of an official inquiry.

The 13 & 14 Vict. c. 61, gave to the Lord Chancellor the power to remove from office the Registrars of County Courts. The 15 & 16 Vict. c. lxxvii. (Local), declared the Mayor, Aldermen, and Commons, in Common Council assembled, entitled to appoint the Chief Clerk of the London (City) Small Debts Court, and "for inability or misbehaviour, or for any other cause which may appear reasonable to the Mayor and Council, to remove" the said Clerk. The 19 & 20 Vict. c. 108, directed previous County Court statutes to be read as part of that statute, and that the Chief Clerk of a County Court should thenceforward be called "the Registrar." The 28 & 29 Vict. c. 99 (regulating County Courts in general), directed that the Chief Clerk and Chief Bailiff of the City Court should thenceforward be styled the Registrar and the High Bailiff, and that the City Court should have the same powers, &c., as a Metropolitan County Court; and it also incorporated with itself all the preceding public statutes relating to County Courts:—

*Held*, that the specific enactment in the 15 & 16 Vict. c. lxxvii. (Local), as

to the power of amotion from the office of Registrar to be exercised by the Mayor, &c., in Common Council assembled, was not taken away by the effect of the general statutes, but still existed in that body: '

*Held*, also, that "reasonable" cause in the Act meant "just cause."

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THIS was a proceeding in Error upon a judgment in the Court of Exchequer Chamber, which had affirmed a previous judgment of the Court of Queen's Bench (1).

In June, 1867, a rule *nisi* for a *quo warranto* was granted by the Court of Queen's Bench against Mr. *Nelson*, to shew cause by what authority he claimed to exercise the office of Chief Clerk or Registrar of the Sheriffs' Court of the City of *London*. It was afterwards settled that an action should be brought by Mr. *Osgood* to recover the fees of his office, which he claimed to hold as a freehold office, and that the questions intended to be discussed should be raised on a special case, and the decision of them should govern the proceedings in the *quo warranto* information. This was done, and the case stated facts of which the following is a summary:—

The Plaintiff (Mr. *Osgood*) claimed to have been entitled on the 2nd of May, 1867, to fill the office of Registrar of the Sheriffs' Court of the City of *London*, having been appointed thereto in the year 1856 by a resolution of the Court of Common Council. At the time he was appointed the title of the office was that of "Chief Clerk of the Sheriffs' Small Debts Court." He was appointed in succession to a Mr. *M. E. Wilkinson*, on whose retirement a committee of the Common Council, known as "The Officers and Clerks' Committee," made a report which settled the salary, and set forth the duties of the intended appointee. There were several candidates for the office, and among them were *John Robertson Aikman* (then Chief Bailiff of the Court) and *George Osgood*. The result of the poll was that Mr. *Osgood* was elected Chief Clerk by sixty-two to twenty-six votes. Mr. *Aikman* therefore continued in his former office. The election was, in form, temporary, but Mr. *Osgood* continued on frequent re-elections to fill the office as then constituted for several years. The name of Chief Clerk was, subsequently, in obedience to the provisions of 28 & 29 Vict. c. 99, changed to "Registrar." In August, 1866, disputes arose between Mr. *Aikman* and Mr. *Osgood*—both referred to Mr. Commissioner *Kerr*,

(1) 10 B. & S. 119, where the facts are fully set forth.



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who wrote some letters on the subject (1), and finally the matter came before the Lord Mayor, Aldermen, and Commons of the *City* in Common Council assembled. It was referred by them in the usual manner to "The Officers and Clerks' Committee." By the members of this committee the matter was investigated: *Aikman* and *Osgood* appeared before them. Evidence was taken, and the committee, on the 13th of March, 1867, made a report in which the mode of proceeding on this inquiry was set forth in detail, and the following resolution was stated: "That in the opinion of this committee such irregularities have been disclosed in the offices of the Registrar and High Bailiff respectively, as seriously interfere with the proper conduct of public business, and that the Court of Common Council be recommended to take such steps as they may deem advisable under the provisions of '*The London (City) Small Debts Extension Act, 1852.*'" This report was laid before the Court of Common Council on the 21st of March, 1867. Both parties were furnished with a copy of the report, and had an opportunity of inspecting the short-hand writer's notes of the evidence. Mr. *Osgood*, on the 28th of March, wrote a letter requesting to be heard by counsel to shew cause why he should not be removed from his office of Registrar, and the 2nd of May was appointed for that purpose. Before that day, the committee's report, with the various letters and documents, and the transcript of the notes of evidence, were printed in a book, a copy of which was delivered to the Lord Mayor, the Aldermen, and every member of the Common Council, and also to *Aikman* and *Osgood*. On the 2nd of May, *Osgood* appeared before the Court of Common Council, which had the assistance of the Recorder and Common Serjeant, to shew cause against his removal from office. Though personally present, he was represented by Mr. Serjeant *Tindal Atkinson* as his counsel. After speeches from counsel upon the case as then presented, the Court of Common Council deliberated, and then passed two resolutions, the first of which declared:—

"That in the opinion of this Court the duties of Chief Clerk or Registrar of the Sheriffs' Court have not been properly discharged by Mr. *Osgood*." The second resolution was—

(1) The charge against Mr. *Osgood* was a general charge of neglect in the performance of his duties, as set forth in these letters.

"That this Court, having carefully considered the evidence as to the manner in which the duties of the office of Chief Clerk or Registrar of the Sheriffs' Court have been discharged by Mr. *Osgood*, is of opinion that reasonable cause exists for his removal from his said office, and the Court doth hereby remove him accordingly."

Mr. *Nelson*, the City Solicitor, was afterwards appointed, *pro tempore*, Chief Clerk or Registrar of the Sheriffs' Court, under "*The London (City) Small Debts Extension Act, 1852.*"

The Court of Queen's Bench, on the argument of this case, was to be at liberty to draw any inference of fact which might have been drawn by a jury.

Mr. *Osgood* contended that he was not lawfully removed from his office, because the office was a freehold office, tenable during good behaviour; that he had been removed without reasonable cause; that no definite charge had been made against him, and that he was removed contrary to the statute, for that the power of removal was in the Lord Chancellor, and not in the Mayor, Aldermen, and Commons of the *City* (1).

(1) The Acts relating to this matter were the following:—

The 9 & 10 Vict. c. 95, which instituted the modern County Courts. By this Act the power of appointing and removing the Chief Clerk of the Court and the High Bailiff was vested in the Judge of the Court.

The 13 & 14 Vict. c. 61, s. 4, the power to remove the Chief Clerks and High Bailiffs of County Courts was vested in the Lord Chancellor.

The 15 & 16 Vict. c. clxvii., intituled "*The City Small Debts Extension Act, 1852*" (Local), was passed with relation to the City of London Sheriffs' Court alone. It introduced certain regulations, and by the 11th section provided: "That every Chief Clerk to be hereafter appointed shall be an attorney of one of Her Majesty's Superior Courts of Common Law, who shall have practised as an attorney for at least five years, and such Clerk shall be appointed by the Mayor, Aldermen, and

and Commons; and it shall be lawful for the Mayor, Aldermen, and Commons, in case of the inability or misbehaviour of the Clerk, for the time being, of the Court, or for any other cause which may appear reasonable to the Mayor, Aldermen, and Commons to remove such Clerk of the Court," &c., and to appoint some other person, qualified as aforesaid, to be Clerk of the Court.

Some other statutes, public and general, were passed on the subject of County Courts, and then came the 19 & 20 Vict. c. 108, entitled "*An Act to amend the Acts relating to County Courts.*" By the 3rd section of this statute it was enacted "That this Act and the Acts passed in the 9 & 10 Vict. c. 95, and the 13 & 14 Vict. c. 61" [and certain other Acts not necessary to be named], "shall be read as one Act, as if the several provisions in the said recited Acts contained were repeated and re-enacted in this Act." The 8th

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The Court of Queen's Bench gave judgment for the Defendant affirming the lawfulness of the removal, both as to the right to remove and as to the form of the proceeding, but the Judges suggested doubts as to the sufficiency of the cause of removal. The Court of Exchequer Chamber sustained the judgment, repeating the expression of the same doubts.

The case was then brought up to this House on Error. The Judges were summoned, and Mr. Baron *Martin*, Mr. Baron

section directed that the Clerk of a County Court shall hereafter be called "the Registrar of the Court."

The 28 & 29 Vict. c. 99 (1865), gave an Equity jurisdiction to County Courts in general, and by sect. 4 enacted that "The Judge and officers of the Court held under the provisions of '*The London (City) Small Debts Extension Act, 1852*,' hereinafter called '*The City Court*,' shall respectively have and exercise the like jurisdiction, &c., in all respects, except the power of appointing officers" as a Metropolitan County Court, "and the Chief Clerk and the Chief Bailiff of the City Court shall henceforth be respectively styled the Registrar and High Bailiff thereof," and they were to be paid such additional salaries as the Mayor and Common Council should direct. Sect. 21 declared that "This Act and the Act of the 9 & 10 Vict. c. 95, and any Act amending or altering the same, shall be read and construed as one Act, as if the several provisions contained in the said Acts referred to, not inconsistent with the provisions of this Act, were repeated and re-enacted in this Act."

The 30 & 31 Vict. c. 142, intituled "*An Act to amend the Acts relating to the Jurisdiction of the County Courts*," was passed in 1867. That Statute enacted, s. 34, "That this Act and the several Acts specified in Schedule D to this Act" [among which were 9 & 10

Vict. c. 95, the 13 & 14 Vict. c. 61, the 19 & 20 Vict. c. 108, and the 28 & 29 Vict. c. 99], "be construed together as one Act." Sect. 35 enacted "That the words '*County Courts*,' when used in this Act or any future Act, shall mean a Court held by virtue of the 9 & 10 Vict. c. 95, and shall mean and include the Courts held by virtue of '*The London (City) Small Debts Extension Act, 1852*,' unless otherwise provided, and such Court shall be holden by the name of '*The City of London Court*,' and shall be a Court of Record, and its decisions shall be subject to appeal in the same way and on the same conditions as the decisions of a County Court are subject for the time being." The rules and orders of County Courts were to be in force for the City of London Court to the exclusion of any rules and orders then in force in that Court, and the fees were regulated. Then came this proviso: "Provided that nothing in this Act or in any of the Acts specified in the Schedule D, to this Act shall take away, lessen, or diminish any of the powers, rights, or privileges of the Judge of the said Court, or the authority of the Mayor, Aldermen, and Commons of the City of London in Common Council assembled in relation to such Court, or to the Judge or officers thereof, as such powers or authority existed previously to the passing of this Act."

*Bramwell*, Mr. Justice *Blackburn*, Mr. Justice *Mellor*, Mr. Justice *Keating*, and Mr. Justice *Brett* attended.

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Mr. *Anderson*, Q.C., and Mr. *Gibbons*, for the Plaintiff in Error:—

The dismissal from office here is without authority. There was no power in the Mayor and Council to pronounce it. The power to appoint and remove the Registrar is not in them, but in the Lord Chancellor. The 13 & 14 Vict. c. 61, vested it in the Lord Chancellor, and now, by the effect of the 19 & 20 Vict. c. 108, which relates to all County Courts whatever, and includes that of the City of *London*, the provision which before applied to other County Courts was made applicable to this one. That statute was enforced by the 28 & 29 Vict. c. 99, which assimilated the City Court to all the Metropolitan County Courts, and changed the names of its chief officers, expressly enacting that the Chief Clerk was in future to be designated as the Registrar, that being the name already given to that officer in the other County Courts. The intention of the Legislature to make the City Court identical with the others was thus plainly shewn. It is true that the 15 & 16 Vict. c. lxxvii. described the Mayor and Common Council as the persons entitled to remove the Chief Clerk, but that was only the declaration of a previously existing power, made in a local Act; but the direct and clear enactments of the 28 & 29 and 30 & 31 Vict. which were public and general statutes, that all the previous County Court Acts should be incorporated with and read as part of those statutes, put an end to the declaration contained in the local Act. If so, then the removal by the Mayor and Common Council is altogether without authority.

But, assuming for argument's sake the power to remove, then the manner in which that power was exercised is irregular. There was no specific charge of misconduct, and in such a case a general charge is not sufficient: *Rea v. The Corporation of Doncaster* (1); and that case shewed, too, that the jurisdiction which pretended to remove the officer ought to be plainly alleged and clearly established. It was not so here. On this latter point, *Rea v. Shaw* (2) was an authority. There the objection to the jurisdiction would have been sustained, but that it was set up at the last moment

(1) 2 Ld. Raym. 1564.

(2) 12 East, 479.



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by the man who had himself previously acted upon it as valid. Here there was no conduct of that kind which could be treated as binding upon the Plaintiff: on the contrary, he had from the first objected, and expressly reserved all his legal rights. In *Rex v. Liverpool* (1), it was held that the foundation of an inferior jurisdiction must be distinctly set forth. Here it had only been assumed to exist.

The Court of the Mayor, Aldermen, and Commons was to be treated as a corporation, or as a Court of Law. If it was to be considered as a corporate body, investigating the conduct of one of its officers who held a freehold office, then it must proceed according to the rules applying to corporate bodies in such cases: rules which the Courts of Common Law have laid down, and the observance of which they have the power to enforce: *Rex v. Cambridge* (2). Any disregard of those rules will render the proceedings void, and will do so even in cases in which the Courts of Law may altogether refuse to take notice of the result of the inquiry. It is true that the case of *Rex v. Cambridge* was the case of a college in a university, but the same principle applies with equal force to a lay corporation.

If the Court of Common Council is to be treated as a Court of Law, then the charge on which it proceeded was vague, and therefore insufficient. So vague a charge would be held bad on a return to a mandamus: *King v. Shaw* (3); and a decision grounded on such a mode of proceeding would be liable to be quashed upon a certiorari. No specific charge was brought against Mr. *Osgood*; nothing which resembled an indictment was furnished to him. The report of the committee resembled, perhaps, a committal by a magistrate; but if so, then he would be entitled to a perusal of the indictment founded on it. That was not furnished to him, for no indictment could be said to exist. But if this resemblance existed, there arose another objection, namely, that there was no jurisdiction to commit; it was as if a committal had been made by a person not in the commission of the peace. Then, again, there had been a change in the committee, which was not composed of the same persons at the beginning and at the end of the inquiry;

(1) 4 Burr. 2244.

(2) 12 Mod. 113; 1 Strange, 457.

(3) 8 Mod. 148.

nor did all those who signed the report attend all the meetings of the committee; besides which the time of office of the committee men first named had actually expired before the period at which the report was made. All these things were matters which vitiated the proceedings. The only way to give an appearance of regularity to these proceedings, would have been to make a new reference, and appoint a new committee. Again, the Mayor and Common Council ought themselves to have heard all the evidence. This they had not done. They were not entitled to take it on the report of the committee. They had so taken it. They had not even the rules for the conduct of the business of the office laid before them. [LORD CHELMSFORD:—A learned counsel was present to represent Mr. *Osgood*, and did not object to any want of evidence, but expressed himself ready to proceed.] That was done in the belief that all the evidence which had been before the committee was produced to the Mayor and Council. That mistake could not bind Mr. *Osgood*. If there had been a mandamus, and these facts had been returned upon it, the return would have been insufficient: *Rex v. Faversham* (1), where also the observations of Lord *Kenyon* shew that if the Court of the Mayor and Council did possess the power of removal, they had no right to delegate that power to a portion of their own body. And that objection is all the stronger, because, this being in substance a criminal case, the evidence ought to have been taken by the whole body which had to decide upon it, and not by any particular portion of that body.

Mr. *Archibald*, and Mr. *Hugh Cowie*, on the other side, were not called on.

THE LORD CHANCELLOR (Lord *Hatherley*):—

Before proceeding farther upon the main point in this case, and taking the opinion of the learned Judges by whom we are assisted upon it, I think it right just to state my view, concurring I believe with that of your Lordships who are present, with regard to one point upon which we almost stopped the learned counsel for the Plaintiff in Error, considering it too clear for argument. He contended that although by the Act of 15 Vict. c. lxxvii. (Local) a power

(1) 8 T. R. 352.

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of amotion from this particular office was granted to the Mayor, Aldermen, and Commons in Council assembled, yet by virtue of subsequent legislation this power of amotion had been transferred from that body to the Lord Chancellor. The argument was this: there are certain Acts of Parliament relating to County Courts which took away from the Judge of a County Court the power which that Judge had before exercised of removing the Registrar of his Court; and transferred that power of removal to the Lord Chancellor. In a subsequent Act, which dealt with County Courts, and gave farther directions as to their powers and farther authorities to them, amongst other clauses there was one which enacted that this particular Court—the Sheriffs' Court of the City of *London*—should have all the powers, authorities, and jurisdiction of the County Courts, and that the Judge there should be in all respects vested with the whole authority of a Judge of a County Court; and then there was a clause by which certain Acts of Parliament, amongst others that Act which I have mentioned as transferring the power of amotion of the Registrar from the Judge to the Lord Chancellor, were incorporated in a fashion which has become common in modern Acts of Parliament; they were directed to be read into the Act I have last been speaking of, as if they had been there repeated. Upon that the suggestion is made that amongst other things there had been embodied in the Act the clause whereby the power of amotion of the Registrar had been transferred from the Judge of the County Court to the Lord Chancellor.

Now, really there would be a complete confusion of terms and of thought if one could allow any such suggestion to be for a moment entertained, because the simple fact is, that the last Act shews that the Legislature conceived it to be desirable that the Sheriffs' Court should have all the powers and authorities of the County Courts as they were then established, but it said not one word about the constitution of that Court, nor one word about altering any of the powers or privileges possessed by the Mayor and Corporation of *London* with reference to dealing with the Registrar or officers of that Court. Upon that point I believe your Lordships concur with me in thinking that we do not need any assistance.

With regard to the main question, before calling upon the

learned counsel on the other side, unless the learned Judges should themselves wish to hear farther argument upon it, it would be desirable that your Lordships should put this one question to the Judges: Whether the Plaintiff was lawfully removed from the office of Chief Clerk or Registrar of the Sheriffs' Court of the City of *London*?

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The question was agreed to, and was put to the Judges, who retired to consider their answer.

*After an interval,*

MR. BARON MARTIN, speaking in the name of the Judges present, said:—

My Lords, the Judges do not require to hear counsel for the Defendant in Error, as they are unanimously of opinion that the Plaintiff was lawfully removed from his office of Chief Clerk or Registrar of the Sheriffs' Court of the City of *London*.

One objection taken by the learned counsel, with regard to the amotion of Mr. *Osgood*, has been already disposed of by your Lordships. The next objection taken was, that that amotion did not take place, as the law required, on the authority of the Lord Mayor, Aldermen, and Commons, but by delegation. In our opinion there was no delegation at all. What was done was, that a complaint having been made to the body which had control in the matter, viz., the Mayor, Aldermen, and Commons of the City of *London*, as to the conduct of Mr. *Osgood*, it was referred by them to a committee, which seems to have been long used in the Corporation of *London*, known as the "Officers and Clerks' Committee;" and what they were directed to do was to make inquiry with reference to the alleged complaint, to take evidence, and to ascertain the truth of it, not for the purpose of that committee coming to any judgment or decision themselves, but for the purpose of their report being submitted to the Mayor, Aldermen, and Commons in order that they might come to a judgment upon it. The argument of the learned counsel is erroneous in point of fact. That has not taken place which they allege to have taken place, and therefore there was no delegation.

We come, therefore, to the main question, which seems to us to



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depend entirely on the 15 Vict. c. lxxvii. s. 11 :—[His Lordship read it.] It is, therefore, obvious that the Mayor, Aldermen, and Commons are to inquire into the matter; that the cause of removal is to be one which appears reasonable to them; and that there is no Court of Appeal of any kind from their decision.

There can be no doubt, my Lords, that the Courts of Law in this country would take care that any proceeding of this kind should be conducted in a proper manner; that the person it was proposed to remove should have every opportunity of cross-examining the witnesses brought forward against him, or of otherwise opposing the case set up against him; that he should have the power of calling witnesses to prove his own case; and that he should have every possible opportunity which a person can have, according to the law and constitution of this country, of defending himself and of establishing that he is not liable to amotion. Your Lordships would take care to see that every person had all those opportunities; and I have no doubt, if your Lordships were satisfied that there was any real substantial miscarriage of justice with regard to Mr. *Osgood*, and that he had been deprived of any opportunity that he ought to have had of defending himself, your Lordships would not permit this amotion to remain, nor any consequence arising from it.

But we are of opinion, that in the proceedings before the committee in the first place, every possible opportunity that could be given to any man was given to Mr. *Osgood* in this matter. He was allowed to cross-examine witnesses, and he was permitted also to call as many witnesses as he pleased. He was repeatedly asked whether he had any farther evidence to produce, and he was permitted to address the Court himself, and to state his view of the matter, and to comment on the evidence. These proceedings having occupied four days, it was on the 21st of March that the committee came to a decision upon the matter. Therefore, as it seems to us, so far as the proceedings before this committee are concerned, it is impossible that any one can have had a fuller and fairer opportunity than Mr. *Osgood* had of bringing forward his case, with any evidence he might have to support it.

It was on the 21st of March that the report of the committee was presented to the Court of Common Council. The Common

Council permitted a period of more than six weeks to elapse before proceeding to discuss it. It was then discussed, and Mr. Serjeant *Tindal Atkinson*, who was counsel on the part of Mr. *Osgood*, then repeated what Mr. *Osgood* had before said, and stated that he did not require any farther particularity in the charge. He was content to take the case as it then stood. He was requested by the Recorder to state whether or not he desired to offer any farther evidence than that which appeared on the shorthand writer's notes, and he stated that he did not, and then proceeded to address the Court at considerable length in regard to this matter. Throughout the whole of the proceedings Mr. *Osgood* had the presence either of the Recorder or of the Common Serjeant for the purpose of assisting the Committee and the Common Council. Therefore, it does seem to us that it is impossible for any man to have had what I may call a fairer trial than Mr. *Osgood* had with reference to this matter.

We also think that it is possible, although there is no necessity for giving any judgment upon it, that if a man was removed from an office of this kind from any frivolous or futile cause, and that appeared before a Court of Law, or before your Lordships, you would in all probability be inclined to treat the removal as a nullity, and not permit the man to be removed from such an office for a mere caprice or for a futile cause. And though it is stated in the Act that it may be done for a cause which may appear reasonable to the Mayor, Aldermen, and Commons, your Lordships would in all probability construe that as meaning a cause which was reasonable, and not merely a futile cause. Not that your Lordships would sit as a Court of Appeal upon the decision of the Mayor and Council; but you would take care to see that the cause was a real and substantial cause. It appears to us to be impossible to read these proceedings without seeing that there was a real and substantial cause in this case if it was established.

As regards the cause alleged in the first place, it is said that Mr. *Osgood* was habitually absenting himself. I do not see how it can be stated otherwise than by stating habitual non-attendance. How could habitual non-attendance be proved, except by a man not performing his duty, and not going from day to day to the duties that were imposed upon him, and of course making excuses

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for his absence? It seems to us, that when non-attendance has taken place, it is for the Mayor, Aldermen, and Commons to decide whether or not the excuse offered is sufficient. There were, again, other matters of the same kind stated with regard to the mode in which the business was conducted with regard to the summonses and other documents, which were allowed to remain unsigned for months, and then signed by a stamp by Mr. *Osgood* or by his deputy. I say nothing with regard to the signing by means of a stamp; it is used now in Judges' Chambers and in County Courts with very great convenience and to a large extent, and that charge would probably be a matter which your Lordships would consider to be of rather a frivolous character.

With regard to the rest of the case, it is impossible not to see that there was evidence of matters affecting Mr. *Osgood* which might reasonably enough be deemed by the Mayor, Aldermen and Commons to be a just cause for his removal. The Courts of Law or your Lordships would certainly protect an officer against being removed for any frivolous or futile cause. That seems to us to be the province of Courts of Law, though they cannot discuss this case in the manner in which it was put forward by the learned counsel for the Appellant, as if your Lordships were sitting here as a Court of Appeal from the judgment of the Mayor, Aldermen and Commons.

For these reasons, my Lords, the Judges are of opinion, in answer to your Lordships' question, that the Plaintiff was lawfully removed from his office of Chief Clerk or Registrar of the Sheriffs' Court of the City of *London*.

THE LORD CHANCELLOR (Lord *Hatherley*):—

I have to express our thanks to the learned Judges for the attention they have paid to this case, and the assistance they have given us in its determination. I confess that my own judgment, and I believe that I have the concurrence of your Lordships in that view, entirely agrees with the answer which has been given by the learned Judges to the question which we have propounded, and which is, indeed, the whole question in the case. It is necessary to add very little to what they have just said.

I feel, as all of us probably feel, a regret that so painful a result

should have accrued to the Plaintiff in this case from a dispute originally arising in a very small subject, and of very narrow dimensions. But the main point we have to consider is this: whether a full inquiry has been made by those who have the power of amotion for reasonable cause, whether reasonable cause has been assigned, and, in the judgment of those persons who have the power of removal for reasonable cause, has been established. The question we have to decide is whether it is competent for any Court of Law to interfere with a course of procedure which is in itself consistent with truth and justice, and to set aside a decision to remove for a cause which may seem to be reasonable, and which is not a mere result of caprice or violence. I apprehend, my Lords, that, as has been stated by the learned Baron who has delivered, in the name of the Judges, their unanimous opinion, the Court of Queen's Bench has always considered that it has been open to that Court, as in this case it appears to have considered, to correct any Court, or tribunal, or body of men who may have a power of this description, a power of removing from office, if it should be found that such persons have disregarded any of the essentials of justice in the course of their inquiry, before making that removal, or if it should be found that in the place of reasonable cause those persons have acted obviously upon mere individual caprice. There is a power in the Courts of Law, as the Lord Chief Justice said, to examine whether reasonable cause has been assigned; and, as one of the authorities which has been cited to us this morning has stated, that by "reasonable" must be meant "just cause," whether just cause has been assigned, and whether there has been any evidence given in support of that just cause, so as to shew that the tribunal has not acted simply upon its own view of what is right and just, without any inquiry into the case; and then, farther, to see whether the accused has had every opportunity of meeting the charge which has been made against him.

I apprehend that it is quite reasonable that the powers conferred by this Act of Parliament upon the Mayor and Common Council of *London* should be controlled within these limits. But, beyond that, when they have pursued the inquiry before them into that which is alleged as a reasonable and just cause, according to the ordinary mode of administering justice—when they have given

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the accused an opportunity of knowing the charges (and I here take occasion to observe that his Counsel did distinctly know the charges, for he did distinctly, as he expressed it, eliminate the charges which were made against his client, by which, I presume, he meant that he abstracted from the mass of evidence that had been given the several charges which had been made); and when the accused had an opportunity of hearing the evidence which had been given in support of those charges, and an opportunity of cross-examining the witnesses, and an opportunity of producing his own witnesses; and when he informed the committee that he had produced all the evidence he desired to produce, and when the cause was one which was just and reasonable in itself, if proved, the committee had no farther duty to discharge. It was left to those in whom the power of removal rested to act and decide upon the evidence so placed before them, and with their decision it is not competent for the Court below, or for us sitting to review the decision of that Court, to interfere.

I therefore concur with the view which the learned Judges have taken in this case, and I apprehend that the course which your Lordships will pursue, however painful it may be in regard to what has been brought forward in this inquiry, will be to come to the conclusion of affirming the decision of the Court below, and dismissing this appeal with costs.

LORD CHELMSFORD:—

My Lords, I have very little to add to the observations which have been made by my noble and learned friend. The only question which your Lordships have to determine is, whether there is evidence of breach or neglect of duty on the part of Mr. *Osgood* for which the Court of Common Council might properly be of opinion that reasonable cause existed for his removal from his office. It is not a question whether the Judges in the Court below, or this House, might have come to a different conclusion if the case had been originally before them; but whether the Mayor and Common Council have proceeded to a motion without any proof at all of a reasonable cause for such a proceeding. There can be no doubt that if the Courts below had been of opinion that

there was no evidence that Mr. *Osgood* had improperly discharged the duties of his office, judgment might have been given for him on the ground that he was unlawfully removed. But all the Judges, without a single exception, have been of opinion that there was evidence which supplied a ground for the judgment pronounced. And this opinion is all the more entitled to attention from the fact that the Judges confess they would willingly have come to a different conclusion if the evidence had not satisfied them that there was proof of Mr. *Osgood* not having properly discharged the duties of his office.

Now I should wish to say a very few words indeed with regard to the proof of neglect of duty brought before the Court of Common Council:—[His Lordship went through several parts of the evidence, and expressed his opinion that the members of the Court of Common Council might reasonably have acted upon it.]

It might be that other persons might not be of opinion that there was a sufficient cause for his removal; but it is clear that there was a reasonable ground. There was not, perhaps, such a ground as others might have thought fit to act upon—but when you are called upon to say that there was no evidence whatever, which is the only ground whereon you could reverse the decision, and when you find instances of neglect proved, I think there is quite sufficient ground for your Lordships to be of opinion that it is impossible to reverse the decision which has been pronounced by the Court of Common Council; and therefore I agree with my noble and learned friend that the judgment of the Court below must be affirmed.

LORD COLONSAY:—

My Lords, I will say a few words indicating the grounds upon which I cannot concur with the contention of the Appellant in this case. I quite agree that the office held by Mr. *Osgood* was what may be regarded as a judicial or official office. I think it is so in its nature, and I think that the tenure of it is secured to him by the terms of the 11th section of the statute, that is to say, that he cannot be removed except for cause. Then that same section of the statute prescribes the parties who are to be the judges of that cause. They are to be the judges of the fact, and judges of its

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sufficiency. That point being established, and such being their jurisdiction, I am also of opinion that if in the pretended exercise of that jurisdiction they act *malá fide* (if that could be possible), or act upon frivolous grounds, they are not performing the duty which the statute gives them, or exercising the power which it confers upon them. If they were to remove him for some capricious cause, such as the shape of his hat, or the cut of his beard, I hold that that would be clearly an improper proceeding, and that a supreme Court of Law could correct it. So, also, although less capricious than that, if it were clearly a futile cause, the Court would interfere and protect the party against injustice done in a pretended or mistaken exercise of the jurisdiction which has been conferred upon the Mayor, Aldermen, and Common Council. But they being the judges of the fact and the judges of the law they were set upon an inquiry in this case.

Now, I think, there has been a misapprehension on the part of the Appellant as to the nature of those proceedings. I do not regard it as a case to be assimilated to a criminal prosecution—it is an inquiry. And I do not regard Mr. *Aikman* as being in the position of a prosecutor in this matter, he disowns it; he assumes the position of an informer in regard to this matter. If the Common Council comes to the knowledge through one officer that a particular officer has been neglecting his duties habitually, I think it becomes the duty of that body, under such circumstances, to inquire into that matter, and to use such means as exist to ascertain the truth. Having been informed by Mr. *Aikman*, through his letter and through the subsequent statements that he made, that Mr. *Osgood* had been in the habit of neglecting his duty, and that certain other objections were made to the way in which he performed his duty, the Mayor and Council did institute an inquiry, and they called Mr. *Aikman*, who had made those statements, he being an officer of the Court, before them, and required him to substantiate what he had said in order that they might see how the truth really stood. That inquiry went on. It may have happened in the course of that inquiry that matters were evolved prejudicial to Mr. *Osgood* which had not been contained in Mr. *Aikman's* statements. Still, if they came out in the course of the inquiry, though Mr. *Osgood* was to be allowed a fair opportunity of

meeting them, they were not to be neglected or treated with indifference.

Then it is said that the charge against him was too general in its character, it being merely that he had not performed his duties satisfactorily. I quite agree that if that had been the original charge against Mr. *Osgood*, and if he was called before this tribunal upon an allegation that he had not properly discharged the duties of his office, he was entitled to ask, and to require, that he should be told in what respect it was supposed that he had not properly discharged the duties of his office. But the matters in which it was said that he had neglected his duties, or that he had improperly performed them, were stated, to a certain extent, at the outset, and the rest were evolved in the course of the inquiry, and Mr. *Osgood* was afforded an opportunity of meeting them, and he did meet them. Whether he met them satisfactorily or not is a different question. The inquiry was a full one, both parties being present and having what assistance they required, and I do not see that the Common Council proceeded in any respect irregularly.

I quite agree with the observation made by the learned Baron, that there was no violation of the rule against delegation in this case. The mode adopted was the mode in which such inquiries are ordinarily conducted, and necessarily conducted, by such a tribunal. What was the course which Mr. *Anderson* stated to have been requisite? It was that after this committee had made their report, if they did make such a report, there should have been an assembling of the Common Council, there should have been a prosecutor appointed, and there should have been a new trial, with all the formalities of a criminal trial, before they could have arrived at a conclusion. But the committee appointed to inquire into this matter having made the inquiry in the ordinary way, having collected the evidence in the ordinary way, and allowed the party, who had been present at the collecting of that evidence, to state his case by counsel, I cannot conceive a more fair mode of proceeding. The conclusion at which the committee arrived is a different matter; but that was the course of the proceeding. The resolution which it came to was a general resolution, that Mr. *Osgood*

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had neglected, or had not properly discharged, the duties of his office. Now, if there had never been any specific statement, either made by Mr. *Aikman*, or evolved in the course of the inquiry, I should have thought that that finding of the Common Council was very similar to what occurred in one of the cases which has been cited at the Bar, and that it would have been too vague for such a case. But when we see that there had been charges made, and matters particularly evolved in the course of the inquiry, I think the general finding must be referred to those matters, and taken as being a general conclusion derived from the inquiry into those matters.

These matters are collected by the Lord Chief Justice in one portion of his speech. They had been classified by Mr. *Osgood's* counsel, but the Lord Chief Justice classifies them into three heads, very distinctly. The undertaking of the learned counsel for the Appellant at the Bar, was to shew that upon none of those heads was there any evidence whatever; but that, on the contrary, they were all totally displaced, and that there was no appearance of evidence to support any of them. If that had been the case, if there had been no appearance at all of evidence to support any of them, then there would either have been what we may call a miscarriage of justice, or an extraordinary piece of misconduct on the part of the tribunal. But if there is evidence to support them—I do not mean to say conclusive evidence to your mind or to mine—but if there is that kind of evidence, which, as the Lord Chief Justice describes it, might go to a jury upon the case, then the statute does make the tribunal the conclusive tribunal, without an appeal of any description from its decision. Now, I cannot say that the case is destitute of evidence. I do not say that I should have arrived at the same conclusion which the Common Council has arrived at, as to the balance of evidence in this case. But the members of that body were the jury as well as the judge, and they have found that there was evidence, and they have pronounced the sentence which they think ought to follow upon it. I cannot find anything to shew that they have transgressed their powers, or that there is anything which we can call a miscarriage of justice in the case. I mean in the legal sense of that term. Whether Mr.

*Osgood* may have been harshly dealt with is another matter. The Lord Chief Justice says that if this had been the finding of a jury, where there is a power of correcting it by a new trial, he would have done what he could to upset such a verdict, and that might have been a very right thing to do ; but we are not in that position. The matter is committed to this body, the Mayor and Common Council, and if there is any evidence which might reasonably, to their minds, have led to such a conclusion as they have arrived at, a Court of Law is precluded, and we are precluded, from interfering with their conclusion.

Upon these grounds, my Lords, I concur in the judgment proposed.

*Judgment of the Court of Exchequer Chamber  
affirmed, and appeal dismissed with costs.*

*Lords' Journal, 28th June, 1872.*

Attorneys for Plaintiff in Error : *Janson, Cobb, and Pearson.*

Attorney for Defendant in Error : *T. J. Nelson.*

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—

1871 BROWNLOW WILLIAM KNOX . . . . . APPELLANT;  
 July 25, 27. AND  
 1872 FREDERICK GYE . . . . . RESPONDENT.  
 July 8.

*Statute of Limitations—Partners—Fiduciary Relation—Trust—Costs—  
 “Comprised.”*

9Ch 505  
 198 344  
 2ChD 286  
 2ChD 537  
 18ChD 250  
 —572  
 9ChD 60  
 21ChD 522

Where there is a remedy at Law, and a correspondent remedy in Equity, supplementing that of the Common Law, and the legal remedy is subject by statute to a limit in point of time, a Court of Equity in affording the correspondent remedy will act by analogy to the statute, and impose on the remedy it affords the same limit as to time.

Where, therefore, in the matter of enforcement of a legal right, the Court of Common Law would, under the provisions of the *Statute of Limitations*, refuse the enforcement after the lapse of six years from the accruing of the right of action, a Court of Equity will, where its power to grant relief is asked for under similar circumstances, adopt the principle of the statute, and decline to grant such relief.

*Per* LORD WESTBURY:—There is no fiduciary relation between a surviving partner and the representatives of his deceased partner: there are legal obligations between them equally binding on both.

*Per* THE LORD CHANCELLOR (*Lord Hatherley*):—There is a fiduciary relation between them. The surviving partner alone having the legal interest in the partnership property, and being alone able to collect it, there arises a right in the representatives of the deceased partner to insist on the surviving partner holding the property, whenever received, subject to the rights of the deceased partner, and he cannot make use of the partnership assets without being liable to an account for them. This rule applies where there have been accounts settled between the representatives of the deceased partner and the surviving partner, and the latter afterwards receives a debt due to the partnership, recognised in the settlement of the partnership accounts, but not at that time received from the debtor.

*K.* advanced money to *G.* on the faith of a letter, which *K.* insisted constituted a contract of partnership in the profits of the business of the *Italian Opera at Covent Garden*. *G.* insisted that it amounted to nothing but an agreement to pay the amount of the loan and the interest on it out of the profits (if any should arise), but that the concern remained his alone. The letters which passed between the parties were held to bear this construction, and therefore an account, as of the profits of a partnership, was refused.

The advance was made with reference to the business of the *Italian Opera at Covent Garden*, the lease of which theatre was in the name of *G.* alone. That theatre was burnt down in 1856, and *G.* hired another theatre (the *Lyceum*), and carried on the business of the *Italian Opera* there, and in two years' time returned to a new theatre at *Covent Garden*, which

had been built in the interval, and of which the lease, as in the former case, had been granted in his name alone :—

*Held*, that the true construction of the letters between the parties shewed that the agreement between them was confined to the old *Covent Garden Theatre* alone, and therefore an account of profits alleged to have arisen at the *Lyceum* and at the new *Covent Garden* theatres was refused.

*T.* advanced £12,000 to *G.* on the terms of partnership. *T.* made a will, leaving this money equally between *K.* and *G.* *T.* died in December, 1854, before old *Covent Garden Theatre* was burned, which event took place in March, 1856. There had been, before December, 1854, negotiations between *G.* and one *H.* to allow *G.* the use of *Her Majesty's Theatre*; but though a sum of £5000 (part of *T.*'s £12,000) had been paid to *H.* under these negotiations, he had never performed his contract. *G.* finally brought an action against *H.*, and recovered judgment for £5000; but ultimately (after the death of *T.*, yet within six years of the date of a bill filed by *K.* for an account) consented to accept £2500 as a compromise. *K.*, in December, 1864, filed a bill against *G.* for an account of profits in the partnership with *T.*, and of what was due to *K.* in respect thereof, under *T.*'s will :—

*Held*, that the right of *K.* under *T.*'s will began in December, 1854, and was barred, in Equity, by analogy to the *Statute of Limitations*, the bill not having been filed till 1864 :—

*Held*, also (*diss.* LORD HATHERLEY, L.C.) :—That the surviving partner not being a trustee for the executors of his deceased partner, the payment of the £2500 from *H.* within six years from the filing of the bill did not take the case out of the *Statute of Limitations*.

*Per* LORD WESTBURY :—The phrase “comprised in the same account” in the 19 & 20 Vict. c. 97, s. 9, means that “would have been comprehended in.”

THE Plaintiff *Knox* filed his bill against the Defendant *Gye* on the 29th of April, 1861, in which he alleged that the Defendant, in September, 1849, became lessee of the *Theatre Royal Covent Garden*, and of the scenery &c. there, for the term of seven years, and carried on the business by means of an arrangement between himself and the several *artistes*, which came to an end with the close of the season of 1850. The Defendant was then desirous of taking the concern of the said *Opera* upon himself, and so expressed himself to the Plaintiff and Sir *W. De Bathe*, who declared their willingness to assist him, and “he having the said concern in his hands, offered to the person or persons who would find the capital a share in the profits, together with interest for their money during the time it might be employed,” the Defendant, in addition to his own share of the profits, to be entitled to the yearly salary of £1500 as manager. No formal

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agreement in writing was drawn up, but the Plaintiff relied on a letter written by the Defendant to Plaintiff, on the 10th of February, 1851. The letter in question was as follows: "I fear you must have long thought me very negligent in not having before written to you some account of my movements and proceedings. For this I can excuse myself by telling you that I wished to delay writing till I could tell you that all the *Royal Italian Opera* affairs were satisfactorily settled; but I can make no excuse for not having, soon after leaving *England*, told you in writing how deeply I have all along felt your most kind and generous conduct towards me, with regard to the undertaking of the theatre. Such kindness has made the deeper impression on me for the reason I never before was in the situation to require such assistance, and to have then found it at a moment when I did require it, and offered with such total disinterestedness, causes me to feel tenfold grateful. I must, however, repeat to you, that never have I for one moment thought of appropriating a farthing of the profit which ought to belong to any one advancing money, but have always intended to pay to you a proportion which I conceive you ought to have, as well as, of course, a proper interest for the money the time it may be employed. This I hope and trust you will consent to. Should you have found any difficulty in raising the money in the manner you spoke of, I have no doubt my bankers would advance it on your security, as we talked of." The rest of the letter contained details of *Gye's* interviews and arrangements with singers in different places on the Continent.

The bill went on to allege that the Defendant assented to the proposal contained in this letter, and entered into a joint bond with the Defendant to Messrs. *Coutts* in order to obtain an advance of £10,000, which was to form the joint capital of the partnership. This sum was placed at *Coutts'* to an account called "The Account of the *Royal Italian Opera*." The cheques drawn upon it were to be in the Defendant's name alone, but were to be marked "*R. I. O.*" The Plaintiff had repaid £5000 of the bond debt. The Defendant had admitted that the season of 1851 resulted in a clear profit of £4226 17s. The season of 1852 resulted in a loss. In the year 1853 farther capital was required, and one *Arthur Henry Thistlethwayte* agreed to become a partner in the adventure, and brought into the

concern a sum of £12,000 as his share of the joint capital of the partnership.

The bill, in order to shew that the Defendant had always written and spoken as if the relation of partnership existed between himself and the Plaintiff, set forth several letters from Defendant to himself. In one dated Sept. 6, 1853, were the following words: "When you go to *Coutts* I would not speak about giving up the theatre, as if that got abroad it would surely prevent the possibility of carrying out such a thing. Mind, I have never told them that your position was otherwise than a security for me for the £10,000." The bill alleged that the Plaintiff and his said partners had at that time an idea of getting rid of the said concern on account of the last two seasons being unprosperous. It set out another letter, dated on the same 6th of September, 1853, written by *Gye* to the Plaintiff, in which it was said: "After all, we did not look at the books the other day. Don't you think we ought to spend a quiet day over them, or do you not think it would be most advisable for you to get some one well versed in such matters to go carefully through them, that is, if you know any one to be trusted with such secrets. Still, the accounts must be perfectly simple, and only require a little patience on our parts. I would not mention to *Coutts* our idea of giving up the theatre, nor throw cold water on it in any way, as that would be the certain way to prevent our disposing of it; in fact, the only chance of selling it to the *Ward* party is in making them believe we are going on." In another letter, dated the 5th of December, 1853, the Defendant wrote that he had been through the books with *Robertson* (the treasurer of the theatre), and after some other matters, the Defendant said: "I am as anxious as you to have some plan decided on for the future, for the dreadful anxiety and heavy responsibility and uncertainty sometimes drive me almost out of my mind." In another letter, dated the 17th of December, 1853, the Defendant said: "Sir *William* led me to think that you imagined I felt some reluctance to give you these accounts. Why should I? If you should have such an impression, dismiss it from your mind." On the 30th of December, 1853, the Defendant (referring to a transaction which was going on with a person named *Hughes*) wrote to the Plaintiff, saying: "I inclose you counsel's opinion on the case of *Her Majesty's*

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*Theatre*, by which you will see we cannot eat our cake and have it too, or get back the money and retain possession of the theatre." In a letter of the 4th of January, 1854 dated from the *Italian Opera House*, the Defendant said: "*Robertson* promises to send me the balance sheet of 1853 by post on Monday morning, and, if convenient to you, I will come to you any time on that day you like. Probably you would prefer meeting here? in fact it would be more convenient here, as we could refer to the books if required." On the 3rd of March, 1854, the Defendant wrote to the Plaintiff, from *Paris*, a letter in which he described what he was doing in engaging singers for the *Opera*; and on the 9th of March another letter of the same kind from *Dresden*. On the 29th of March, 1854, the Defendant wrote a letter in which, speaking of Mr. *Thistlethwayte* and his wish to "leave the concern," the Defendant said: "You ask me to put in writing how the business is to be conducted for the future; how can I do this? You know how happy I should be to do whatever you like and whatever is fair and proper, but I do not understand on what basis you wish. Pray remember that I have never refused or hesitated to do anything you have wished or suggested, which the terms of your letter of yesterday would lead any indifferent person to suppose. If I knew what your wishes were, whether to remain in or leave the concern, I could then, at all events, suggest my own ideas, but I do not. When last we spoke on this subject here, you spoke of leaving the speculation altogether, and said it was best to know when to make the first loss. Whatever my opinion may be of the hopes of the future chances of prosperity of the *Opera*, you know I have abstained at all times from saying anything to persuade you to carry it on. Much as I should regret your leaving it, however, I candidly confess that what has occupied my mind more than anything else since yesterday, is the consequences as to your reason for your great change of feeling towards me, and my utter ignorance of having done or said anything to deserve so great a change. My feeling was, has been, and always will be, one of deep gratitude to you for the kind and unasked for act of assisting me on first taking the *Opera* on my own shoulders. This feeling has ripened into one of sincere affection for you, which has never for one moment altered, and therefore I never could, for one moment, either in thought or deed,

have ever even contemplated doing anything contrary to your wishes."

In March, 1853, a sum of £5000 had been borrowed, on the promissory notes of *Thistlethwayte*, and given to the Respondent in order that the same might be and they were accordingly paid by him to one *W. S. P. Hughes*, in respect of a year's rent in advance for *Her Majesty's Theatre*, which the Respondent had at that time agreed to take of *Hughes*, who, as an *elegit* creditor, claimed to be in possession of that theatre, but who never gave possession of it to *Gye*. This sum, the bill alleged, was in fact part of the capital brought into the concern of the *Royal Italian Opera Covent Garden* by *Thistlethwayte*, all whose £12,000 remained in the concern.

In a letter of December, 1853, from *Knox* to *Gye*, it was said: "*Thistlethwayte* is much disgusted, and is very anxious that the £5000 paid to *Hughes* should be got back, and I promised that it shall be; so you must write at once to *Hughes*, as he has not given you any equivalent for the money paid."

An action was subsequently brought by *Gye* against *Hughes*, and a verdict recovered for £5000 and costs. This claim was, in 1862, compromised by *Gye* for £2500, which he received, as the bill alleged, without *Knox's* assent or knowledge.

The bill alleged that *Thistlethwayte* had in 1854 been ordered with his regiment to the *Crimea*; that a deed was proposed between him and "his partners," the Plaintiff and Defendant; this was not executed, but Mr. *Thistlethwayte* executed a will bequeathing the said sum of £12,000, his share of the capital in the said undertaking, to the Plaintiff and the Defendant for their equal benefit as tenants in common; that since then the Plaintiff and Defendant had continued to carry on the said adventure or undertaking in partnership. The bill alleged that the Plaintiff did not at first know that a will had been executed, but had believed, from the expressions used by Mr. *Thistlethwayte* himself, that it was a deed.

The bill set out a letter of the Defendant dated the 7th of February, 1855, stating a profit of £2661 4s. 8d. for the season of 1854, "supposing all debts to be collected." The letter went on to say that the books were at the theatre, and should be sent to *Wilton Crescent* (the Plaintiff's residence) whenever the Plaintiff would like to look quietly over them.

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The bill stated that the season of 1855 had resulted in a profit, but that no account had been rendered by the Defendant; that on the 5th of March, 1856, "the theatre (which had been, against the wish of the Plaintiff, let for a short time to a person of the name of *Anderson*, who gave a masked ball therein, contrary to his agreement) was burnt down." It then alleged that the *Lyceum Theatre* was rented for the years 1856-57 "in the name of the Defendant, but for the purposes of the partnership;" that the Plaintiff accompanied the Defendant to *Paris*, and "upon the representations and assurances of the Plaintiff that the concern would be carried on, the *artistes* consented to fulfil and did fulfil their engagements, and accepted reduced salaries for 1856 and 1857," which seasons resulted in an aggregate profit of £5000. The lease from the Duke of *Bedford* for the new theatre was to be in the Defendant's name; the cost of the building was to be defrayed by contributions; "the repayment thereof was to be secured to the several contributors by a mortgage of the new lease and the new building." The bill set forth a letter of the Defendant, in which he said he had given to *Lucas* the builder the name of the Plaintiff "as one of the contributors," and a letter on this subject was to be sent by the Duke of *Bedford's* solicitor to the Plaintiff and to "all other persons advancing the money." The letter spoke of £3000 as to be advanced by the Plaintiff, and said: "Should the getting of this money be of any expense to you, I shall be most happy to pay it out of the theatre funds." The Plaintiff declined to become one of the contributors. The new theatre was opened in May, 1858, and such stock and effects as had been saved, which the bill alleged to be "partnership stock and effects" saved from the fire, were, in that season and the seasons of 1859 and 1860, employed in the business, which for those seasons resulted in a considerable profit; but the Defendant had never accounted to the Plaintiff for any part of such profit.

Disputes about that time arose between the parties as to the nature of the relation existing between them; the Plaintiff affirming and the Defendant denying that there was a partnership. On the 30th of May, 1860, the Plaintiff wrote a letter requiring the Defendant "to settle in full all moneys I may have advanced with interest thereon, and also be prepared to settle with Messrs.

*Coutts & Co.*, and also all other transactions connected with the *Royal Italian Opera*, in which I am liable."

There were other letters demanding a settlement in nearly the same terms.

The prayer of the bill was, that the partnership might be declared to be dissolved; that the debts of the partnership now remaining due might be paid and satisfied; that accounts might be taken of the partnership dealings and transactions, of what was due to the Plaintiff in respect of his share of the capital of the partnership (including the Plaintiff's share of the said sum of £12000) and interest thereof, and of the profits of the partnership; for a receiver; and for general relief.

The case came on for hearing before Vice-Chancellor *Wood* on the 4th of December, 1863, when his Honour was of opinion that the transactions set forth in the bill did not establish a partnership between the parties, but did constitute an agreement between them for an advance of money by *Knox* upon the terms of the same being repaid on demand, out of the profits accruing to *Gye* from the adventure. The decree therefore declared that a contract of partnership did not at any time exist between *Knox* and *Gye*, but that they became jointly and severally bound to Messrs. *Coutts*; that the Appellant had paid £5000 on that bond on an agreement to be repaid by *Gye* out of the profits from the adventure; that *Knox* was entitled to be so repaid, and to be repaid any farther sums he might have to pay on such bond. As to the claim of partnership between *Knox* and *Gye*, the bill was dismissed. An inquiry was directed as to profits from the 5th of March, 1852, up to the date of the decree, with liberty to apply; and it was ordered that *Knox* should be at liberty to amend his bill as to any alleged assignment of the share of *Thistlethwayte*, and to file a supplemental bill to raise such claim as he might be advised to make in respect of the bequest in *Thistlethwayte's* will; and if within three months from the date of the decree *Knox* should file such bill, the inquiry directed by the decree was not to be proceeded with until farther order.

On appeal to the Lords Justices they differed in opinion. Both their Lordships thought that the case for a partnership had failed. But Lord Justice *Knight Bruce* thought that *Knox* should be at

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liberty to file a new bill, on the footing of the agreement to pay the sum advanced out of profits, while Lord Justice *Turner* thought that *Knox* was entitled to relief on the bill, as it stood, in respect of the agreement, and that the decree of the Vice-Chancellor was, so far, approximately if not entirely correct, and that the cause ought to be allowed to stand over with leave to amend as regarded the claim made by *Knox* through the interest bequeathed to him by *Thistlethwayte*. This opinion, however, was withdrawn in order to allow of an appeal, and the decree of the 6th of December, 1863, was ordered to be reversed and the bill to be dismissed, but without prejudice to farther proceedings.

In October, 1864, *Knox*, in pursuance of the leave reserved, filed a second bill, praying for accounts from the 14th of March, 1851, to the time of taking the accounts; that the partnership between *Gye* and *Thistlethwayte* might be directed to be wound up and the debts of the partnership paid; that an account might be taken of what was due to *Knox* in respect of his share of the the sum of the £12,000 (including the whole of the judgment debt due from *Hughes* and interest) and also of the profits of the partnership between *Gye* and *Thistlethwayte*; that a receiver might be appointed; and for general relief.

The answer to this second bill set up, with respect to the claim for *Thistlethwayte's* share, the *Statute of Limitations*; that *Knox* was not entitled to any account of the profits of the new adventure at the *Lyceum* and the new *Covent Garden Theatre*; that as to the sum of £5000 advanced by *Knox*, it was advanced by him pursuant to previous agreement for the purposes of the then *Covent Garden Opera*, and was not to be repaid if, in that adventure, it was lost, and that after the advance it was lost by the destruction of the *Opera House*; that *Knox's* right to repayment could only be tried at Law and not in Equity; that as to the share of *Thistlethwayte* the partnership with him was confined to the business of the old theatre; that the whole of the capital of that concern was lost by the fire; and that *Knox* was not entitled to any account of profits made since then.

This second cause came on before Vice-Chancellor *Wood* on motion for a decree, when His Honour, on the 30th of January, 1866, expressed an opinion that the Statutes of Limitation did

not apply either as regarded the sum of £5000, which, if a debt, was not a debt payable on demand, but was not a debt at all, but was an equitable claim enforceable in Equity alone; or as regarded the share of *Thistlethwayte*, the application of the statute to that part of the claim was excluded by the fiduciary relation existing between *Thistlethwayte* and *Gye*, and by the fact that the money recovered from *Hughes* was received within six years before the institution of the suit; and an account was ordered of profits from the date of the bond given to *Coutts* to the close of the season of 1857; (at the *Lyceum*, the concern there being treated as a mere continuation of the original concern at old *Covent Garden*). And it was declared that *Knox*, as executor of *Thistlethwayte*, was entitled to the capital remaining due to *Thistlethwayte* in respect of his share in the capital and effects of the original undertaking to the time when *Gye* entered on his new undertaking, and also to the profits on such capital during such period and no longer. And that *Knox* and *Gye* were interested by the will in equal moieties in this share of the capital, and that *Thistlethwayte's* share amounted to one-third of the profits of the concern.

*Gye* took this decree by appeal to the Lord Chancellor (Lord *Chelmsford*), who, by an Order dated the 20th of February, 1867, directed that the said decree should be discharged and varied, and in lieu thereof declared that the £5000 advanced by *Knox* in October, 1853, on the bond to *Coutts* was advanced to be employed in carrying on the undertaking of the *Royal Italian Opera* at *Covent Garden*, upon an agreement that it should be repaid out of the profits thereof, and continued invested therein on such agreement until the said undertaking was determined by destruction by fire of the *Opera House* on the 5th of March, 1856. The order, therefore, directed an account of profits from March, 1852, to March, 1856. And the bill was dismissed so far as it related to the claims of *Knox* as executor of *Thistlethwayte*, on the ground that it was barred by the *Statute of Limitations*.

This order was now brought up by appeal to this House.

Sir *R. Palmer*, Q.C., and Mr. *Townsend* (Mr. *J. J. Wood*, was with them), for the Appellant:—

The order of the Court below was wrong in limiting the account

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to the period when old *Covent Garden* was destroyed by fire. The Appellant was a partner with the Respondent, and the partnership was not affected by the destruction of the theatre and the removal of the business of the partnership from one house to another.

Then, if they were partners, the liability of the Respondent (who managed their common business) to render an account to his co-partner cannot be disputed: *Miller v. Miller* (1); which was recognised and acted on in *Millington v. Holland* (2). In the former of these cases an account was ordered, though more than six years had elapsed since the partnership was discontinued, and in the latter the representatives of a former partner sustained a bill for an account against the surviving partner, the Vice-Chancellor holding that the surviving partner was bound to get in the assets, for that a statement made in 1863 shewed that there were some, and that that being so they must be discharged. These cases were in accordance with *Robinson v. Alexander* (3), where the last item in the transactions between two persons who were partners in a ship and its earnings arose in 1806, and the bill was not filed for above twenty years afterwards, but it was held sustainable, and an account was directed. *Barber v. Barber* (4) appeared to be the other way; but it was doubtful there whether the accounts were not merchants' accounts which were expressly excepted from the statute 21 Jac. 1, c. 16, and that circumstance probably occasioned the decision. There were other reasons for doubting the authority of that case, which had been observed upon in *Robinson v. Alexander*; and it was curious that though it occurred about a year before *Foster v. Hodgson* (5) it was not there even referred to; and in this later case Lord *Eldon* adopted an entirely different course. In *Lindley on Partnership* (6) the learned author says that "So long as a partnership is in existence and each partner is in the exercise of his rights and the enjoyment of his property the statute has no application at all," but he seems to put a limit to this statement by saying that the statute has been held to apply after the partnership has been destroyed, his reference for that matter being, however, made to this very case itself. It is sub-

(1) Law Rep. 8 Eq. 499.

(2) Weekly Notes, 22 Nov. 1869. 230

(3) 2 Cl. & F. 717.

(4) 18 Ves. 286.

(5) 19 Ves. 180.

(6) Last Ed. vol. ii, p. 980.

mitted that in this case the partnership was not destroyed, and that the supposed limitation on the rule does not, therefore, apply. In *Stocken v. Dawson* (1), *A.* by will authorized the sale of his share of a business to *B.*, his surviving partner, whom he also appointed his executor. No sale really took place, but *B.* carried on the business. *B.* died, and it was continued by *C.*, his executor. The supposed sale was afterwards set aside, and the creditors of *C.* were held by Lord *Langdale* not entitled to any claim against the partnership property, so far as the rights of *A.*'s representatives, the representatives of the deceased partner, were concerned. *Burdick v. Garrick* (2) decided that an agent who stands in a fiduciary situation towards his principal, and this is especially the case with a partner, cannot set up the *Statute of Limitations* in bar of a suit for an account by his principal, money held by the agent being treated as held in trust for the principal. It is held in trust by one partner for another. The Lord Chancellor (Lord *Hatherley*) in his judgment there (3), founding himself on *Foley v. Hill* (4), took the distinction between money entrusted to a banker and money entrusted to a factor or agent, saying that in the latter case it is entrusted for the purpose of being "employed in a particular manner," and that the agent therefore must be treated as a person in a fiduciary position. Here *Gye* was the acting managing partner of the concern. He was entirely in a fiduciary position towards his partner, who advanced money to be employed in a particular manner, namely, in this particular concern, but who did not actively interfere in the management. So long as the undertaking, which was that of presenting to the public performances of Italian operas, lasted, so long the partnership continued, and it did not matter where the business of the undertaking was carried on.

The arrangement which existed between these parties was not affected by the destruction of the theatre. They were engaged in one common adventure or undertaking—it began at old *Covent Garden*, it continued at the *Lyceum*, and afterwards at the new *Covent Garden Theatre*, the lease of which house, though taken (as that of the old house had been) in the name of *Gye* alone, was

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(1) 9 Beav. 239

(2) Law Rep. 5 Ch. Ap. 233.

(3) Law Rep. 5 Ch. Ap. 240.

(4) 2 H. L. Cas. 28.

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held by him in trust for his partners. The possession of the old lease enabled him to get the new one, and part of the property of the old theatre, all in fact that could be saved from the fire, was used in the other two houses, where, after the fire, *Gye* carried on the joint business of himself and partners.

[THEIR LORDSHIPS intimated that if an account could at all be directed, that part of the business which related to the *Lyceum* must be altogether excluded from it, as they were of opinion that the partnership with the Appellant, supposing the undertaking to have that character, extended only to the old *Covent Garden Theatre*. They therefore directed counsel to confine themselves to the argument as to the *Statute of Limitations*.]

Mr. *Jessel*, Q.C., and Mr. *Lindley* (Mr. *Gye* was with them), for the Respondent :—

The facts here do not establish that there was at any time a partnership between the Appellant and the Respondent, but assuming that at one time there was one, it ceased by the destruction of the theatre, for it was only formed for that particular undertaking, and was brought to an end when the theatre was burnt. The account demanded is, therefore, asked for long after the period of limitation has elapsed.

The *Statute of Limitations* is a bar to this claim, made in the form of a bill in Equity for an account, in the same way as it would have been a bar to any proceeding at Law. The same principles govern the Courts of Law and of Equity with regard to the application of the provisions of the statute. At first the proceedings in account were always taken in Courts of Law, but the machinery of those Courts was, for such a purpose, cumbrous and ineffectual. So recourse was had to the Courts of Equity, where the machinery for taking an account was far more easy. But the rules of law applicable to taking it were and must be the same in both Courts.

What are the authorities? *Bridges v. Mitchell* (1) shews that though open or current accounts between merchants are not barred, yet they become so when once they have been adjusted between the parties. And founded upon that case came the decision in

(1) 1 Gilb. Eq. Rep. 224; Bunb. 217.

Barber v. Barber (1). That case is not subject to the criticisms which have been made upon it. All the accounts there are distinctly said to have ceased for six years, and that was the ground of the decision. *Foster v. Hodgson* (2) was no contradiction to *Barber v. Barber*, and in that very case Lord *Eldon*, referring to the differences of opinion as to open merchants' accounts, mentioned *Welford v. Liddel* (3), and said (4) that "a merchant's accounts will be barred if there is no item within six years," and that there could be no relief upon that bill, for "whether they are to be taken as an open merchant's account" or not, the statement in the bill that no demand had been made for twelve years was a sufficient answer. In *Ault v. Goodrich* (5) an account was ordered because it was clear that the dealing by the younger *Wilcox*, sought to be made the subject of account, had taken place within six years of filing the bill, and it is said there with relation to the elder *Wilcox's* estate, that he, having devised his estate upon trust for the payment of his debts, the *Statute of Limitations* could not be pleaded in bar of demands which had a legal existence at the time of his death. It is clear, therefore, that the lapse of time here is a sufficient answer to this claim. In *Hill v. Walker* (6) the statute was distinctly admitted to constitute a bar to a claim against which time had run. *Millington v. Holland* (7) is not an authority on the other side, for there a statement of the accounts, with the balance due, was prepared by the solicitor to the representatives of the deceased partner, and being so prepared was presented to the surviving partner, and by him acknowledged and signed, and the bill was brought within six years after its signature, and consequently the statute could not be set up against it. But where the facts allowed it to be set up, as in *Adams v. Barry* (8), it was held a complete answer to the suit.

There was no express trust created here, and the law will not imply one. The parties stood upon legal rights alone. In the case of an infant, which much more nearly resembles a trust, the

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(1) 18 Ves. 286.

(2) 19 Ves. 180.

(3) 2 Ves. 400.

(4) 19 Ves. 186.

(5) 4 Russ. 430.

(6) 4 K. & J. 166.

(7) Weekly Notes, 1869, p. 238.

(8) 2 Col. C. C. 290.

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statute would be a bar. In *Lockey v. Lockey* (1), Lord *Macclesfield* said that "the receipt of the profits of an infant's estate is not such a trust as being the creature of a Court of Equity the statute shall be no bar to. . . . If the infant lies by for six years he is barred of his action of account at Law, so he shall be of his remedy in this Court, and there is no sort of difference in reason between the two cases." This opinion was referred to and adopted by Lord *Redesdale* in *Hovenden v. Annesley* (2).

There is no fiduciary obligation imposed on a surviving partner after the dissolution of the partnership; he is liable to make good his legal obligations, but no more; there is nothing which affects him in the character of an equitable trust. In that respect, therefore, no exception is established to prevent the operation, in his favour, of the *Statute of Limitations*.

It is a principle of law that the chattels of a trading partnership do not pass to the surviving partner, but continue applicable to the purposes of the trade: *Buckley v. Barber* (3), where the whole law of partnership is, as to this point, fully considered in the judgment of Mr. Baron *Parke*.

Sir *R. Palmer* replied.

Adjourned.

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LORD WESTBURY:—

My Lords, this is an appeal from a decision of my noble and learned friend on the woolsack, when Vice-Chancellor, afterwards reversed by my noble and learned friend (Lord *Chelmsford*) as Lord Chancellor. It has been requested by those two noble Lords that I and my noble and learned friend Lord *Colonsay* should commence by stating our opinions to the House upon the only point which is now left to be decided between the parties. That point may perhaps not be of much importance in a pecuniary point of view to those parties; but it is a very material question of law, and it is rendered more material by the difference of opinion. I shall endeavour, therefore, to state my view of the matter at some length (although I hope not inconveniently so), for the consideration of your Lordships.

(1) *Prec. in Ch.* 518.

(2) 2 *Sch. & Lef.* 633.

(3) 6 *Ex.* 164.

This is a bill filed by the Appellant as the executor and sole representative of a deceased partner, Mr. *Thistlethwayte*, against the surviving partner, Mr. *Gye*, for an account of the partnership estate, and of the share of the deceased partner therein as it stood at the dissolution of the partnership by his death in December, 1854, and of the assets and profits subsequently received by the surviving partner. Mr. *Thistlethwayte* died in December, 1854. His will was proved by the executor (the Appellant) on the 6th of November, 1863. It appears that very shortly after the death of Mr. *Thistlethwayte* letters of administration to his estate were granted to a creditor on the supposition that he had died intestate; and this administration continued in force until revoked by the probate granted to the Appellant. There is no statement in the bill to account for the interval of time between the death of Mr. *Thistlethwayte* and the proof of the will by the Appellant. Nothing appears to have been done by the administrator. The bill was filed by the Appellant on the 4th of October, 1864. I omit all reference to those portions of the bill which contain statements and raise questions wholly unconnected with the subject of the present appeal. There is no special statement in the bill on the subject of the share of Mr. *Thistlethwayte* in the estate of the partnership, or of the Respondent's dealings with the effects or assets, except that it is alleged that within six years before the filing of the bill the Respondent, Mr. *Gye*, received a large sum of money from a Mr. *Hughes*, in respect of a debt or liability due to the partnership, and which sum was therefore part of the assets of that partnership; and it is on the fact of the receipt of this sum within six years before the institution of the suit, that the Appellant chiefly relies. There is no allegation that any account was ever opened or kept by the Respondent *Gye*, as between himself and the late partnership, or in which there were entries of his receipts or payments as surviving partner.

Upon this bill the Plaintiff prays, with reference to this particular point, "That an account may be taken by and under the decree and direction" of the Court, "of what is due and owing to the Plaintiff from the Defendant in respect of the Plaintiff's share of the sum of £12,000 brought into and left in the concern by Mr. *Thistlethwayte*, as hereinbefore mentioned (including the whole of

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the judgment debt recovered, or which might, but for the wilful default of the Defendant, have been recovered from *Hughes*), and the interest thereof and the profits of the partnership; and that what shall appear on taking the same account to be due from the Defendant may be decreed to be paid by him to the Plaintiff." From this and from other portions of the bill it is clear that the account sought is an account of the estate of the partnership as it existed at the time of the dissolution, and of the property and receipts by Mr. *Gye* subsequent to the dissolution of the partnership. The bill is, therefore, in effect, an action by the Appellant, as executor of the deceased partner, against the surviving partner for an account of the share of the deceased partner in the partnership between him and the Respondent, which terminated by the death of Mr. *Thistlethwayte*, in December, 1854. An action might have been brought for this account by the Appellant against the Respondent at Common Law, but in a case like the present a Court of Equity assumes and exercises concurrent jurisdiction with the Courts of Law, and this bill is brought by virtue of such concurrent jurisdiction.

18th Dec. 38 By the *Statute of Limitations* (21 Jac. 1, c. 16), it is enacted that all actions of account and upon the case (with an exception which has been since repealed) shall be commenced and sued within six years next after the cause of such action or suit, and not after. This enactment is, in effect, repeated in the 9th section of the 19 & 20 Vict. c. 97 (passed in 1856), with this additional provision, namely, that "no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." I deem this provision most material, and therefore I will call your Lordships' particular attention to it. It forbids any claim in respect of a matter which arose more than six years before the action.

In the case that we are considering, the matter, namely, the dissolution of the partnership, and, consequently, the possession of the partnership property by the surviving partner, did arise more than six years before the commencement of this suit. The provision

forbids that any action of account the cause of which arose more than six years before suit shall be considered as liable to be sued upon after such six years "by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." The Appellant here relies upon the claim against *Hughes* having been received and realized within six years before the commencement of the suit. The question is, was that claim against *Hughes*, that debt due to the partnership, a thing comprised in the same account? An account of the partnership estate would unquestionably comprise that claim, and the statute was directed, as we all know, against the erroneous notion that an account which had been barred by the lapse of six years after the last entry in the account might be considered as opened and revived by the receipt of a subsequent sum of money more than six years after the date of the last entry. It removes that notion, provided the receipt after the six years is the receipt of an item comprised in the original account. The word "comprised" I construe as equivalent to "that would have been comprehended" in; that is, that would have been an item in the account demanded.

Here the right of action arose upon the death of Mr. *Thistlethwayte* in December, 1854, and the cause of such action was the possession of the partnership estate by the surviving partner. The right to an account was, therefore, barred by the statute in the month of December, 1860. If as an answer to the statute the Appellant intended to rely upon the receipt by Mr. *Gye* of the debt due to the partnership from Mr. *Hughes*, he should have alleged and proved that this sum was received within six years from the death of Mr. *Thistlethwayte*; but this he has not done, and it is to be inferred from a paragraph in the bill (as is, in fact, stated by the answer) that the money was not received from *Hughes* until the month of June in the year 1861. This sum was a matter that was comprised in the account demanded by the bill, that is to say, which would have been an item in that account if taken; and, therefore, if the right to the account was taken away by the statute previously to the receipt of such item, the subsequent receipt cannot remove the bar and restore the title to the account.

That a Court of Equity will not, after the lapse of six years

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without acknowledgment, decree an account between a surviving partner and the estate of a deceased partner has been long settled by various decisions. The rule, of course, must be the same where the parties are reversed, and the representative of the deceased partner is the Plaintiff. The general principle was laid down as early as the case of *Lockey v. Lockey* (1), where it was held that where a Court of Equity assumes a concurrent jurisdiction with Courts of Law no account will be given after the legal limit of six years, if the statute be pleaded. If it could be doubted whether the executor of a deceased partner can, at Common Law, have an action of account against the surviving partner, the result will still be the same, because a Court of Equity, in affording such a remedy and giving such an account, would act by analogy to the *Statute of Limitations*. For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the *Statute of Limitations*, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a Court of Equity acts by analogy to the *Statute of Limitations*, the meaning being, that where the suit in Equity corresponds with an action at Law which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule of procedure. But if any proceeding in Equity be included within the words of the statute, there a Court of Equity, like a Court of Law, acts in obedience to the statute. I have no doubt, therefore, of the *Statute of Limitations* being a bar to the whole of the relief sought by the Appellant as executor of *Thistlethwayte*.

Your Lordships will no doubt recollect that in the observations I have made with regard to the adoption of the statute by a Court of Equity, I refer to those well-known expressions of Lord *Redesdale* (2), in which he distinguishes between the cases where a Court of Equity acts in analogy to the statute, and where it acts in obedience to the statute. Where a Court of Equity frames its remedy upon the basis of the Common Law, and supplements the Common Law by extending the remedy to parties who cannot have

(1) *Prec. in Ch.* 518.(2) *Hovenden v. Annesley*, 2 Sch. & Lef. 630, *et seq.*

an action at Common Law, there the Court of Equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords.

In deciding this case, it must be recollected that the representative of a deceased partner has no specific interest in, or claim upon, any particular part of the partnership estate. The whole property therein accrues to the surviving partner, and he is the owner thereof both at Law and in Equity. The right of the deceased partner's representative consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership.

Another source of error in this matter is the looseness with which the word "trustee" is frequently used. The surviving partner is often called a "trustee," but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner the law confers on his representatives certain rights as against the surviving partner, and imposes upon the latter correspondent obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner; but when these obligations have been fulfilled, or are discharged, or terminate by law, the supposed trust is at an end.

The advantage of correcting by familiar practice an inaccurate use of a word, although that use may be found in treatises of reputation, I remember to have seen singularly illustrated in a case that occurred some years ago in a Court of Law, where the Court of Law was told that in an agreement for the sale of a house the vendor was trustee for the purchaser, and the Judges were called upon to apply a rule which is quite right as between a complete trustee by declaration and the *cestui que trust*, but quite wrong where the vendor is called a trustee only by a metaphor, and by an improper use of the term; and it required some trouble to convince them that though the vendor might be called a trustee he was a trustee only to the extent of his obligation to perform the agreement between himself and the purchaser. In like manner here, the surviving partner may be called a trustee for the dead man, but the trust is limited to the discharge of the obligation, which is liable to be barred by lapse of time; as between the

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express trustee and the *cestui que trust* time will not run ; but the surviving partner is not a trustee in that full and proper sense of the word. It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord *Mansfield*, that nothing in law is so apt to mislead as a metaphor. This is one of the sources of error in this case. The mistaken phrase that a surviving partner is a trustee, and that therefore no time can run as between him and the representative of the deceased partner, has led to what I humbly conceive to be the error in the judgment originally given.

There is nothing fiduciary between the surviving partner and the dead partner's representative, except that they may respectively sue each other in Equity. There are certain legal rights and duties which attach to them ; but it is a mistake to apply the word "trust" to the legal relation which is thereby created. It will be asked whether the bar by the statute can be greater than a release between the parties? In the answer to that question the nature of the release must be required to be stated. If on an account stated a release is given, the release will be limited to that account, and will not bar the right of the executor to have an account of subsequent receipts. But if the release be of the right to an account altogether, then the release will be exactly equivalent to the bar here created by the statute, and will bar all right whatever to claim the benefit of any subsequent receipt by the accounting party.

My Lords, upon these grounds I am humbly of opinion that my noble and learned friend on my right (Lord *Chelmsford*), who was then Lord Chancellor, was correct in his view of the case, and that this part of the Appellant's case wholly fails and must be dealt with accordingly. I regret to say that the printed cases, which are of considerable length, have been made to extend to all the other portions of the case which have been abandoned at the Bar.

LORD CHELMSFORD :—They were not abandoned. We stopped the counsel upon them.

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LORD WESTBURY :—We stopped some, but I thought others were abandoned. I dare say my noble and learned friend is more accurate in his recollection than I am. However, they have all been printed in the case. I regret therefore to say that I see no possibility of escaping from the obligation of dismissing this appeal entirely, and dismissing it with costs.

LORD COLONSAY :—

I concur in the result arrived at by my noble and learned friend. I shall not go over the details of the case. They have been fully stated by him. But I desire to express in a few sentences the grounds of my judgment:

I hold that the *Statute of Limitations* does apply to a suit brought by the executor of a deceased partner against the surviving partner demanding an account of the partnership concerns; and I hold, that such is the relative position of the parties, and that such is the demand made in this suit. I farther hold that, in the general case, the *punctum temporis* from which the statutory period of six years begins to run, is the date at which the partnership estate came to be vested in the surviving partner. At any time during the currency of that period the executor of the deceased partner may bring a suit demanding from the surviving partner an account of the partnership concerns, but after the statutory period has elapsed no such suit can be maintained. The present suit was not brought till after the lapse of the statutory period, if the period is to be counted as running from the date I have indicated. The deceased partner, Mr. *Thistlethwayte*, died in November 1854, and the bill was filed in October, 1864. But it is said that in the interval, viz. in January, 1859, a considerable sum was received by the surviving partner as a compromise of a debt of larger amount due by one *Hughes* to the partnership estate; and it is contended that, as a period of six years had not run from the date of that recovery, until the filing of the bill, the statute does not apply. I cannot adopt that view. If adopted, the result would be that a new period of six years would run from the date of every recovery

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of partnership debts, and that would, in effect, make the statute valueless in regard to partnership accounts. And I see no reason for it, because the account if sued for within the statutory period must have comprehended all debts and claims, whether recovered or unrecovered, and whether good, bad, or doubtful. The kind of suit we are now dealing with is a suit for an account of the whole partnership concerns. I do not say that if a sum is unexpectedly recovered after the lapse of six years the executor of the deceased partner, though he has lost the right to sue for an account of the partnership concerns, may not in another kind of suit demand a share of the particular sum so recovered. But I do not think that a suit such as the present suit, demanding an account of the whole partnership concerns, can be brought against the surviving partner after the lapse of more than six years from the period at which he first became liable to be convened in such a suit.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, I regret that I have been unable to bring myself to concur in the views which have been expressed by the two noble and learned Lords who have addressed your Lordships on this case, I did say that I should, on every account, regret the continuance of the litigation between the parties in the present suit, which cannot be productive of any benefit either to the one or to the other, under any circumstances; but I have the less reason to regret it now, inasmuch as the noble and learned Lords having taken the views which they have done of my noble and learned friend's judgment, the consequence, of course, is, that that judgment will be affirmed, and that the litigation will be terminated.

But in expressing my dissent from that judgment I have to express it very strongly with reference to one particular part of the address of my noble and learned friend who first moved the judgment of the House, namely, that part in which he said, very much to my surprise, that there is nothing fiduciary between a surviving partner and the executors of his deceased partner. I confess, my Lords, that I thought it was an elementary principle of law that the partnership which at Law survives to the surviving partner, which carries to him at Law the whole interest in

the partnership assets, which, treating him as a joint tenant, vests the whole of the partnership estates in him, was always subject to the doctrine of a Court of Equity, that in Equity the interest of a partner in the partnership is that of tenancy in common as between the two partners: so that the executors of a deceased partner have an interest in those assets which the surviving partner alone can get at, and that the surviving partner alone having a legal interest in the property, there arises, necessarily, a right, as between the executors of the deceased partner and him, to insist upon his holding those assets, which he so collects, according to the partnership interest, or subject to the share which the executors of the deceased partner, in right of their testator, are entitled to claim. So much so, that it is trite law that a surviving partner cannot make use of the assets of a deceased partner (apart at present from the *Statute of Limitations*, which I will consider presently), without being accountable for the use he has made of them. The executors of the deceased partner have a right to a sale of every portion of the partnership property, so completely are they held to be in a fiduciary position, so completely are the assets, including the plant or houses, the machinery or stock in trade, or whatever the description of property may be that comes into the hands of the surviving partner by right of his survivorship at law, and which are all vested in that surviving partner by right of his survivorship at law, held to be property in all of which, whether they are chattels of the partnership, or estates of the partnership, the executors of a deceased partner have an interest commensurate with the extent of the share of their testator. They have a right, therefore, to have that property so disposed of that it may be applied under the direction of a Court of Equity, according to the equitable rights between the partners. I quite agree that as regards the *Statute of Limitations* the point rests in a somewhat different position; but I thought it necessary in the first place to enter my protest against the language, which was to me entirely novel, that there was no fiduciary relation between the survivor of two partners and the executors of the deceased partner.

Now, as regards the right to an account, I cannot quite conceive that the right of the executors of a deceased partner

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will be barred by the *Statute of Limitations* if they do not assert their right to the account within the statutory period, and that Equity will follow the Law in that respect, and that it will adopt, as to a suit, the limit which the Law has assigned with reference to the commencement of an action. It appears to me that the case we have had to consider here is this: I will assume that an account had been taken upon the death of the deceased partner, or immediately after the death of the deceased partner, that everything which could be ascertained had been then ascertained and adjusted, that the account was complete, and that releases were given. Those releases of course could only go to the extent of the claim that then existed as against the surviving partner. The surviving partner could not in such an account be made answerable for anything that he had not at that time received. There could be no proceedings taken against him in respect of moneys which he had not received. In taking the whole account, the account would be taken of all that had then come to him, and if the partnership property was not to be sold as a going concern (occasionally the Courts of Equity do realize partnership assets), and if therefore the debts were not to be taken at a valuation and made over to some person who had the management of the sale, the consequence would be that the debts outstanding must remain outstanding until they were collected, and no right of action would exist in the executors of the deceased partner in respect of those assets until they had been collected.

Thereupon, if the accounts had all been settled and nicely adjusted and balanced, and if no debt was due from one partner to the other up to that period, assuming that the partners were partners in moieties, as soon as an asset, say of the amount of £20,000, had been received by the surviving partner by right of his survivorship as partner, then, and then only, would the executors of the deceased partner have a right to a moiety of that money, namely, £10,000. I apprehend it would be an extraordinary answer for that partner to make to any such a claim: True it is, you were entitled to this once, but you have settled all accounts more than six years ago—the parties who were indebted to the firm were not at that time able to pay their debts—they have paid them since—the money has been collected by me, the sur-

living partner, who alone could collect it ; but having collected it, I say that I hold no fiduciary position towards you ; I will keep the whole of the money, and though I do not dispute that you represent a person who was once my partner to the extent of a moiety, and although I do not dispute that you could have had no right against me in respect of this sum, because the money could not be collected at the time when the account was taken, yet I can now answer thus : You should have filed your bill for an account at an earlier period.—Perhaps he would say you should have kept on filing a bill every six years in order to have some sort of hold upon me the surviving partner in respect of those assets.

The case I have put is not imaginary—it is not imaginary that a large sum of money may be received long after the ordinary accounts of the partnership have been closed. I well recollect a celebrated case, which is to be found reported in many of the books of the Court of Chancery, under the name of *Boyd v. Barfield*. Persons constituting a firm were ruined by the French Revolution, they afterwards recovered large sums of money in respect of claims they had anterior to the Revolution, and at an interval of more than twenty years they paid more than £100,000 in discharge of debts due by them to their various creditors. I will put the case of a large firm of partners, of whom all but one had died. Several years afterwards a creditor pays a debt, say of £20,000, the surviving partner takes the £20,000 and puts it all into his own pocket, and says : I am in no fiduciary position to the executors of the deceased ; the whole of this money is mine, and I will enter into no account. Can he do this, and is there no remedy against him ?

I am anxious, at all events, to put on record my protest against the view which has been taken by my noble and learned friend in this matter. I apprehend that the right view to take of the matter would be this : if the partner who has insisted, and who has a right to insist, upon the benefit of the *Statute of Limitations*, says to the executor of the deceased partner, I am ready to pay you your moiety (that is, if the share should be a moiety) of those assets which I have received, but I decline to enter into any account that is barred—I concede (as is here done by Mr. Gye) that your testator was once a partner with me—I concede that he was,

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as my partner, entitled to a share—I concede that I have only received this money by right of the partnership, and that, except for the partnership, I could not have received it; conceding that, I am willing to pay you that which is your own, but farther than that I will not go; and although I have received this sum, and am ready to hand it over to you, holding, as I must, as trustee for you in respect of your interest in the partnership, I will not go back to the partnership accounts, which I say are all settled, and as to which there are no accounts between us. I think Mr. *Gye* would have had a right to say so, but he does not. He says, on the contrary, You are a debtor to me. I believe he says that, and he has a right to say so. I apprehend that it is he who requires the account in order to retain the assets, for he must admit an account to be necessary in order to enable him to retain the assets. That is my view of the case. I confess I have not heard anything which justifies me in abandoning that view, beyond a proposition which is to me so novel that I cannot accede to it, namely, that there is no fiduciary relation at all between a surviving partner and the executors of a deceased partner. I cannot accede to that, and not acceding to it, it appears to me that Mr. *Gye* had only one of two courses open to him, namely, that of handing over the money he had received from Mr. *Hughes*, or the deceased partner's share of it, to the executors of the deceased partner, assuming that all accounts had been settled up to that period, or to say, I shall demand an account, and shew by an account that the whole of that money is mine. For anything that appears that might have been the actual result.

Upon those grounds, my Lords, I confess that I entertain the opinion which I before entertained. But the majority of your Lordships taking the other view, the course to be taken will, of course, be to affirm the decision of my noble and learned friend, and to dismiss the appeal, and if it is to be dismissed, I quite agree that it must be with costs.

LORD CHELMSFORD :—

My Lords, the principal question in this appeal is, whether the Appellant, in respect of his advance of £5000 to the Respondent, is entitled to an account of any profits which the Respondent may

have made on the transfer to the *Lyceum* of the company of opera singers engaged for performances at *Covent Garden Theatre* after the destruction of that theatre. In other words, whether the advance in question was made by the Appellant in respect of the performance of operas at *Covent Garden Theatre* only, or was intended to assist in an undertaking by the Respondent to carry on operatic performances generally without restriction to any particular theatre. Upon appeal from the decree of the Vice-Chancellor (now my noble and learned friend on the woolsack), I was of opinion that the agreement or understanding (for, as I then said, it is difficult to describe it accurately) was altogether specific and local in its character; and in this opinion your Lordships unanimously concur.

It was exceedingly difficult for the Appellant to contend successfully for a contrary conclusion, when he had in his bill stated that "he entered into partnership with the Defendant in the adventure of undertaking the *Royal Italian Opera House, Covent Garden*, of which a lease was procured to be granted by the proprietors to the Defendant in his own name, it being arranged that the Plaintiff and the Defendant should be jointly and mutually interested in the profits of the *said* adventure or undertaking," and in his affidavit in support of the motion for a decree he had sworn that "at the beginning of the year 1851 he agreed to join with the Defendant in the speculation of undertaking the *Royal Italian Opera, Covent Garden*, the Defendant having previously obtained a lease of the said opera house;" and in his cross-examination upon this affidavit had said: "I state the exact time when I undertook to join the Defendant in the speculation of the *Royal Italian Opera, Covent Garden*. The result of our discussions was, that myself and Sir William De Bathe should join the Defendant in carrying on the opera at the *Royal Italian Opera House, Covent Garden*, for the year 1851."

It was intimated to the counsel, in the course of the argument, that your Lordships were agreed upon all the questions raised by the appeal except as to the right of the Appellant to an account in respect of Mr. *Thistlethwayte's* share in the partnership with the Respondent. It is impossible not to observe from the facts of the case, that if the *Statute of Limitations* does not operate as a bar,

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the account will not benefit the Appellant in the smallest degree, as it can only be continued down to the time of the destruction of *Covent Garden Theatre*, at which time not only had no profits been realized by the undertaking, but it is proved that the loss amounted to upwards of £40,000.

After carefully reconsidering the question, I feel compelled to adhere to the opinion upon which I proceeded in making the decree appealed from, that the *Statute of Limitations* applies to the case, and that the receipt of the money due from *Hughes* did not prevent the statute from continuing to run. I need not say how very much my confidence in this opinion would have been increased if it had been concurred in by my noble and learned friend on the woolsack. In the judgment of my noble and learned friend there is a remark, almost incidentally made, that “the *Statute of Limitations* would not apply to a partnership account of this description;” but that the statutes are applicable to the present case appears to me to be clear. The statute 21 Jac. 1, c. 16, s. 8, which limited actions of account to six years after the cause of action, contains an exception of such accounts as concern the trade of merchandise “between merchant and merchant, their factors and servants,” as to which there was no statutory bar till the 19 & 20 Vict. c. 97, the 9th section of which Act enacts that all actions and suits for such accounts shall be commenced and sued within six years after the cause of such actions or suits. Now, although the action of account at the time of the passing of the Statute of *James* was one of a peculiar description in the Courts of Common Law (which has since become obsolete), the Courts of Equity, upon bills for an account, considered “that they were bound to act”—not merely by analogy to the statute, but, in the words of Lord *Redesdale* in *Hovenden v. Lord Annesley* (1), “in obedience to it;” and he adds: “I think the statute must be taken virtually to include Courts of Equity, for when the Legislature by statute limited the proceedings at Law in certain cases, and provided no express limitations for proceedings in Equity, it must be taken to have contemplated that Equity followed the Law, and therefore it must be taken to have virtually enacted in the same cases a limitation for Courts of Equity also.”

(1) 2 Sch. & Lef. 607, 631, *et seq.*

Thus in the cases of *Martin v. Heathcote* (1) and *Barber v. Barber* (2), both of which were cases of bills for an account, and the answers insisted that none of the transactions in respect of which the account was sought occurred within six years before the filing of the bill, the bills were dismissed. It is true that these cases were over-ruled by *Robinson v. Alexander* (3), but only on the ground that they came within the exception of merchants' accounts, which exception (as I have already shewn) no longer exists. And in *Foster v. Hodgson* (4), upon a bill filed for an account, it appeared upon the face of the bill that more than six years had elapsed since the account stopped, the Defendants demurred, it was held to be an answer to the suit, and that as the fact appeared upon the bill the objection was properly taken by demurrer.

In *Tatam v. Williams* (5), Vice-Chancellor *Wigram* dismissed a bill filed by surviving partners against the executors of a deceased partner who had died thirteen years before the institution of the suit, on the ground of lapse of time, observing that he understood "the rule at Law now to be settled that if all dealings have ceased for more than six years the statute (even between merchant and merchant, their factors and agents) is a bar to the whole demand, except where the proceeding is an action of account, or perhaps an action on the case for not accounting." And he added: "In this Court there is direct and very high authority for the proposition that a Court of Equity will not after six years' acquiescence, unexplained by circumstances, or countervailed by acknowledgment, decree an account between a surviving partner and the estate of a deceased partner." The authority of these cases cannot be affected by Lord *Brougham's* observations upon the imperfectly-reported case of *Barber v. Barber* (2), that case having been overruled in the House of Lords on the ground (already stated) that it fell within the exception of merchants' accounts in the Statute of *James*. According to the marginal note of *Barber v. Barber* (2) (which must be inaccurate) the Master of the Rolls held the case not to be within the exception, although excepted by the express words of the statute.

(1) 2 Eden, 169.

(3) 2 Cl. &amp; F. 717.

(2) 18 Ves. 286.

(4) 19 Ves. 180.

(5) 3 Hare, 347.



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The above cases shew that the limitation to six years of actions of account applies to bills in equity for an account, and there can be no difference in principle between a suit by surviving partners against the executors of a deceased partner and one by the executors of a deceased partner against a surviving partner, which is the present case.

The *Statute of Limitations*, then, being applicable, and beginning to run upon the death of Mr. *Thistlethwayte* in November, 1854, upon what ground is it alleged that it was stopped in its course, and that although six years afterwards elapsed it did not operate as a bar to the suit for an account? The ground taken is, that the debt of £5000 due from *Hughes* to the partnership was satisfied by the payment of a smaller sum in discharge of his liability in the month of January, 1859, and that the bill was filed in October, 1864, within six years of such payment. Of course, it makes no difference in the case that *Hughes* paid a smaller sum than was due from him instead of the whole debt. The question to be determined is, whether, when a right to demand an account of a partnership arises, and afterwards six years elapse, the payment, before the expiration of the six years, of a debt owing to the partnership when the time of limitation began to run, will take the case out of the statute? Now, in taking the accounts of a partnership all outstanding debts due to the partnership must necessarily enter into the account, and consequently the Appellant having a right to demand an account, the debt due from *Hughes* would have had to be included as part of the partnership assets. The payment of that debt, or the compromise with *Hughes* (which is the same thing) did not in any way change the nature of the account to which the Appellant was entitled; it only realized the assets which, whether outstanding or not, must have been placed to the credit of the partnership. If the effect of the payment of *Hughes's* debt is to create a new right to an account, then every debt due to a partnership which is received after a dissolution, must, in like manner, give a fresh right to demand an entire account of the whole of the partnership concerns, and this equally whether six years have elapsed or not, after a suit for an account might have been commenced before the debt due to the partnership was received. The consequence of which would be that when a partner-

ship is dissolved by death, and there are outstanding debts to be collected by the surviving partner, the *Statute of Limitations* could never operate as a bar to a suit for an account against him. The payment of a debt due to a partnership cannot affect the rights of the parties arising out of the partnership *inter se*, like the part payment or acknowledgment of a debt, which takes a case out of the *Statute of Limitations* as to the debtor, on the ground that he thereby admits the existence of a debt. The right to an account (amongst other things) of an outstanding debt, which must be included in the account as part of the partnership assets to be collected, cannot be affected by payment of that debt which merely converts into realized assets what was previously uncollected, and cannot stop the course of the *Statute of Limitations*, which was running against the claim to an account of the partnership concerns.

It was said that upon payment of the debt by *Hughes* a new right to sue accrued to the Appellant. But the right to sue for what? The answer must be, for an account. But that he was entitled to sue for all along, and the account must have included this very debt of *Hughes*, the receipt of which is supposed to have created a new right to an account. There may be a difficulty in determining what is the right of an executor of a deceased partner (in the case put by my noble and learned friend), where he has allowed the *Statute of Limitations* to run against his claim to an account, and a debt has been received by the surviving partner after the six years have elapsed. But this is a difficulty occasioned by his own laches, and I see no reason, if he thinks that his interest in the sum received has not been absorbed by its application to satisfy debts due from the partnership, why he should not have a right to sue for his share in this sum (a very different thing from a suit for an account of all the partnership transactions), the surviving partner being at liberty to defend himself by alleging and proving that the whole of the sum received had been applied, or was applicable, to the payment of partnership liabilities.

The Appellant probably never thought it worth his while to demand an account, because he must have been satisfied that Mr. *Thistlethwayte's* capital was swallowed up in the total destruction of the theatre. I continue to be of opinion that the *Statute of*

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*Limitations* is a bar to the Appellants' right to an account, and therefore that on this point also the decree appealed from ought to be affirmed, and the appeal dismissed with costs.

*Order of 20th of February, 1867, affirmed, and appeal dismissed with costs.*

*Lords' Journals, 8th July, 1872.*

Solicitor for the Appellant: *Southee*.  
Solicitors for the Respondent: *Tamplin & Tayler*.

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J. COURT F. GRIER AND OTHERS . . . . APPELLANTS;  
AND  
ROBERT F. GRIER . . . . . RESPONDENT.

*" Issue"—" Settle"—Marriage Articles—Settlement of Estate—Landed Estates Court—21 & 22 Vict. c. 72.*

A covenant in marriage articles to settle an estate, after the payment of an annuity to the intended wife, "upon his issue" by the said intended wife, must be construed as a covenant for strict settlement, and excludes the husband from creating charges in favour of younger children.

By articles of marriage it was recited that the intended husband had received a sum of £600 from *J. S.*, his intended wife, and he covenanted to settle upon her an annuity of £60 for her life, to commence from his death, charged upon his lands, with the ordinary powers of distress and entry, and to settle the residue and remainder of his said lands "upon his issue by the said" *J. S.*, his intended wife. There were several children of the marriage. Some years after the marriage he executed a deed by which he charged on his lands various sums of money in favour of younger children, devising the lands themselves to his eldest son and his other sons successively in tail male:—

*Held*, that this deed creating these charges was void, for that the covenant in the articles gave him no power to charge the lands for the benefit of the younger children, and must be interpreted to mean that he would settle the lands in the ordinary form of strict settlement.

The younger children had, in the character of "incumbrancers," obtained an order from the Landed Estates Courts in *Ireland* for a sale of the lands and a distribution of the money, the produce thereof. This was done. But some time afterwards the eldest son, as "owner" of the lands, brought the whole matter by appeal before the Court of Chancery in *Ireland*, which reversed this order of the Landed Estates Court, and (the money having been brought into Court) directed it to be paid out to the eldest son.

In this House the decree of the Court of Appeal was confirmed.  
*Held*, that the Court of Appeal had, under 21 & 22 Vict. c. 72, s. 39, the

*Landed Estates Act*, full power to set right, in all respects, the decision of the Court appealed from, without any necessity for any fresh proceedings.

*Per* LORD CHELMSFORD :—The proviso in the 64th section of that statute is confined to the case of an “owner” not absolutely entitled to the money produced by the sale of the estate.

Observations by Lord *Cairns* on the manner in which this covenant in the marriage articles would have been executed by the Court of Chancery upon a bill filed for specific performance.

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THIS was an appeal from a decision of the Court of Appeal in Chancery in *Ireland*, by which certain orders of the Landed Estates Court, dated the 23rd of January and the 25th of May, 1871, were discharged (1).

*Robert Grier* was, in the year 1822, seised of an estate tail in possession of the lands of *Garvagh* and *Gurteen*, in the county of *Longford*, then producing together about £180 a year. He was to receive a sum of £600 with his intended wife, and on the 15th of April, 1822, in contemplation of marriage, he executed articles of marriage, by which, reciting these matters, a jointure of £60 a year was provided for *Jane Slemmon*, his intended wife. There was a covenant for quiet enjoyment, and then came a covenant in these words: “And moreover, it is farther agreed upon that the said *Robert Grier* do settle all the residue and remainder of the said lands, houses, and premises, with their issues and profits now arising, or that may hereafter arise from them, upon his issue by the said *Jane Slemmon*, after the payment of the said sum of £60 a year as a jointure settled by the said *Robert Grier* on the said *Jane Slemmon*, his intended wife.” This was followed by a covenant for farther assurance framed in the ordinary form. The marriage took place, and there were nine children issue thereof: *Robert F. Grier*, the eldest son (the Respondent), *John Court F. Grier* (the first Appellant), and seven others. *Robert F. Grier* when about twenty years of age left *Ireland* for *America*.

In 1846, *Robert Grier* became possessed of the fee in the said lands and premises subject to the jointure to his wife, and in 1861 executed a deed-poll by which, after reciting the articles of 1822, he “in execution and performance of the covenants” therein, and subject to the jointure of £60 a year, charged the whole of the

(1) *Ir. Rep.* 6 Eq. 1.



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lands and premises with the several sums thereafter mentioned, namely £200 to each of his sons other than his eldest son *Robert F. Grier*, and the sum of £700 to each of his said daughters as thereafter provided, the charges amounting in the whole to the sum of £4100; subject thereto he conveyed and assured the lands to his eldest son *Robert F. Grier* in tail male, with like limitations to his other sons successively, and, in default, to his daughters as tenants in common. One of the sons having died, the sum of £200 which had been given to him was divided into four equal shares among *Robert Grier's* four daughters, making the sum given to each £750 instead of £700.

Most of the charges thus created were afterwards purchased by *John Court F. Grier* and the other Appellants.

*Robert Grier* (the father) died suddenly in *England*, on the 19th of January, 1868, leaving his widow him surviving. It was alleged that the income of the lands was insufficient to pay all the charges, and it was determined to sell the lands, and *John Court F. Grier* accordingly, in February, 1868, presented, as "incumbrancer" (he being one of the sons provided for by one of these charges) a petition to the Landed Estates Court praying for a sale of the lands, subject to the jointure, and made *Robert F. Grier* (the eldest son) a party thereto, as "owner" of the lands. An abstract of the petitioner's title was lodged with the petition. The charge of £4100 was the only incumbrance affecting the lands for which the sale could be ordered in the Landed Estates Court.

On the 13th of February, 1868, an order for sale was made unless within the time therein named cause should be shewn to the contrary by *Robert F. Grier*, after service upon him. The limit of time fixed was twenty-eight days after service, and service upon the widow, *Mrs. Grier*, and another person named in the order, was to be deemed good service. On the 7th of July, 1868, this conditional order for sale was made absolute (1). The lands were sold, and produced only the sum of £4120, which sum was

(1) Whether *Robert F. Grier* received due notice of these proceedings in the Landed Estates Court, was a question raised in the Court below;

but it became immaterial by the decision of this House on the validity of the charges created by the deed of 1861.

lodged in Court by the purchaser. On the 22nd of June, 1869, the deed of conveyance was duly executed to the purchaser by Judge *Lynch*, the Judge of the Landed Estates Court.

On the 18th of July, 1870, *Robert F. Grier* (the eldest son) returned to *Ireland* from *America*, and on the 26th of November, 1870, served upon all parties concerned a notice of a motion to be made on his behalf in the Landed Estates Court. The notice was in the following form :—"That the owner be at liberty to apply to this Honourable Court, or that this Court do forthwith order, that the orders or decisions of this Court made in this matter upon the final schedule of incumbrances, whereby or by virtue whereof the several sums of money set out in the schedule to this notice were paid out to the several parties therein respectively named, be reviewed or rescinded ; that the sums be relodged to the credit of the said matter," &c., "or for such other order as this Honourable Court may be pleased to make." And notice was thereby given that *Robert F. Grier* would, on affidavits filed by himself, Mr. *A. Chartres*, and Mrs. *Jane Grier* (the widow), and other documents, found his application to the Court.

The application to the Court was founded on affidavits which charged a family conspiracy against *Robert F. Grier*, who alleged that he had never received a notice of the conditional order for sale, nor knew of the same until his return to *Ireland*, in July, 1870 ; that the deed-poll of September, 1861, had been executed by *Robert Grier* without the knowledge or consent of him, the said *Robert F. Grier* ; that according to the covenant of 1822, he was entitled to the estate, and that (subject to the jointure) the lands ought to have been settled upon him and the heirs of his body.

The decision of the Landed Estates Court was adverse to *Robert F. Grier*, who carried the case by appeal to the Court of Appeal in Chancery in *Ireland*, where, on the 19th of June, 1871, an order was made whereby the orders of the Landed Estates Court directing the sale and distributing the money were discharged, and it was declared that the deed of September, 1861, was not warranted by the articles of 1822, but was invalid ; and that, accordingly, on the death of *Robert Grier*, his eldest son, *Robert F. Grier*, became entitled to the lands for an estate tail in possession therein, free from the charges created by the said deed.

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The money produced by the sale had been brought into Court, and was ordered to be paid over to *Robert F. Grier*.

This was an appeal against this order of June, 1871.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *J. F. Walker* (of the Irish Bar), for the Appellants:—

The deed of 1861 was in real accordance with the intention of the parties who executed the marriage articles of 1822. There never was any intention to provide exclusively for the eldest son. On the contrary, it must be taken that the parties used the word “issue” in its widest sense, and meant that all the children should receive a benefit. In no part of the marriage articles is there anything which justifies a contrary belief; and when it is recollected that these articles were expressly made in contemplation of marriage, it must be assumed that its object was to provide for all the children of the marriage. The deed was a *bonâ fide* execution of the purpose of the articles, and a Court of Equity, recognising the rule that articles are considered as minutes only of an agreement not to be followed literally, will take a liberal view of its provisions.

In cases of this kind, the rule of the Courts is that there shall not be such an estate in the parent as will enable him to defeat the interest of the children. That is for their general protection. A like rule must in principle be applied as to the eldest son. The Lord Chancellor (though he admitted that it was with regret) thought that the agreement to settle the lands to which the articles refer, “upon his *issue* by the said *Jane Slemmon*,” could not be otherwise satisfied than by a strict settlement. But that was to give to the word “issue” a restricted meaning, contrary to the plain intention of the parties, and not required by any inflexible rule of law. “Issue” is a word of flexible meaning, is to be interpreted by the general purport of the instrument where it is found, and in this instrument plainly meant all the children of the marriage. *Dod v. Dod* (1), and *Hart v. Meddlehurst* (2), do not require that such a construction as that which was adopted in the Court below should be put on this word, while other cases justify a liberal construction of it.

(1) Amb. 274.

(2) 3 Atk. 371.

In *Davies v. Davies* (1) there were articles of marriage very similar to these. The husband did not execute any settlement, but mortgaged the property, with notice to the mortgagee of the articles; it was held that the husband only took a life estate, and that there having been notice to the mortgagee, he could not hold as against the issue of the marriage. In *Rochfort v. Fitzmaurice* (2) there were post-nuptial articles, the father having then three children—two sons, *H.* and *T.*, and a daughter—and he covenanted with trustees to settle lands to himself for life, remainder to trustees to preserve, remainder to the use of *H.*, and to permit him to take the rents and profits for his life, remainder to the heirs male of the body of *H.*, remainder to *T.* in the same form, remainder to unborn sons in strict settlement, remainders over; it was held that *H.* took only an estate for life. These cases certainly go to impeach the construction put upon the marriage articles in the present case, and to shew the desire of the Courts to protect, as far as possible, the children generally. Lord Chancellor *Sugden* there (3) speaks of the common form of settlement made upon articles of marriage as being that of strict settlement, but he only means that that is so as affording the means of protecting the issue against the act of the father. He does not mean that all marriage articles of this sort are to be interpreted so as to give the whole estate to the eldest son alone. In the Court below *Trevor v. Trevor* (4) was relied on, but that case is really inapplicable here; for there the covenant was to settle to the husband for life, to the wife for life, and after her decease to “the heirs male of the body” of the husband and wife. So it was clear beyond dispute that that covenant could not be satisfied except by a strict settlement. But there was another case of the same name in recent times—*Trevor v. Trevor* (5)—where in a will a direction was given to settle to the use of *G. R.* for life, remainder to his “issue in tail male in strict settlement,” and in default of such issue, over, and there the intent prevailed over technical words. The words “in tail male” were held to be descriptive, not of the persons, but of the interest they were to take, and, consequently,

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(1) 4 Beav. 54.

(2) 2 D. & War. 1.

(3) Ibid. 18.

(4) 1 Eq. Cas. Abr. 387; 1 P. Wms. 622.

(5) 1 H. L. Cas. 239.

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the daughters of *G. R.*, he having no sons, were entitled to take as tenants in common. And *Blackburn v. Stables* (1) and *Jervoise v. Duke of Northumberland* (2) shew that not merely "issue," but "issue in tail male" are not necessarily identical with "heirs male of the body." In *Taggart v. Taggart* (3) the land was given to the husband, "the one half of the said land to be the right title and interest of the issue, whether son or daughter"; and there no preference was given to the eldest son, but the whole issue, son and daughter, were held to take as tenants in common. In *Howel v. Howel* (4) Lord *Hardwicke*, on a difference of expression in two parts of the same marriage articles, treated the two dispositions as different, favoured one which created a charge for the benefit of younger children, and referred to a case before Lord *Cowper*, where a voluntary charge in favour of younger children was sustained, although, as he said, some harshness had been used towards the eldest son in effecting it. And in *Roberts v. Kingsly* (5) the Court considered all the circumstances, and though a settlement was rectified in favour of the eldest son, yet he was compelled to make his election between the advantage he obtained thereby and the benefit he had taken under a will; and even as to the first point, the result of the case was rather to prevent the father obtaining complete control over the estate than to disable the younger children from participating in the property with their eldest brother. A Court of Equity will even alter a settlement upon a discovery made some time after its execution that there had been a mistake as to the intentions of the parties: *Duke of Bedford v. Marquis of Abercorn* (6).

Here the money had been distributed, and the only regular course was to institute a suit to recover it. The Appeal Court had no power to order that it should be paid back.

Mr. *May*, Q.C., and Mr. *Chaworth Ferguson* (both of the Irish Bar) for the Respondent:

The construction of these marriage articles was mistaken in the Landed Estates Court, but has been set right in the Appeal Court.

(1) 2 V. & B. 370.

(2) 1 Jac. & W. 570.

(3) 1 Sch. & Lef. 84.

(4) 2 Ves. 358.

(5) 1 Ves. 238.

(6) 1 My. & Cr. 312.

All the cases now referred to were cited in *West v. Holmesdale* (1), and were epitomised there in the judgment of the Lord Chancellor, who shewed clearly that, where a supposed intent of parties was set up against the ordinary settled technical meaning of the words used, that intent must be plainly manifested on the face of the instrument so that the technical meaning could not be followed without defeating the manifest intent of the parties. That is not so here. The words are the ordinary words of conveyancers and the ordinary forms of conveyancing must be followed in the settlement. If so, then the estate must be settled in the form of strict settlement. There was no pretence for saying that the articles in any way conferred on the father the power to charge the property with portions for younger children. Yet here it was charged with them to the full value of the whole estate, and in effect it might be said to be not given to the eldest son, but given away from him. They commented on the cases which had been cited on the other side, and insisted that unless the ordinary rules of Courts of Equity in executing settlements were disregarded this deed of September, 1861, must be declared void. There was no plain intent here which would be defeated by giving the words used their strict and proper meaning.

There was nothing in the statute 21 & 22 Vict. c. 72, which rendered it necessary for the Respondent to institute a fresh suit. The 39th section of that statute conferred on the Court ample powers to rescind or vary its own orders.

Mr. *Walker* replied.

THE LORD CHANCELLOR (Lord *Hatherley*) :—

In this case, which is an appeal from a decision of the Court of Appeal in Chancery in *Ireland*, sitting in effect as a Court of Appeal from the Landed Estates Court in *Ireland*, the question that arises is this, whether or not the Court of Appeal in Chancery has rightly decided the effect of an agreement contained in the articles or settlement by Mr. *Grier*, upon his marriage in 1822, with his wife *Jane Slemmon*, by which he engaged to settle upon the issue of the marriage the lands which were mentioned in that

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(1) Law Rep. 4 H. L. 543.

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instrument? That is the real and main question to be decided, although certain other questions have been argued before us, which were raised in the original suit, and have been raised now again before your Lordships, as to the jurisdiction of the Landed Estates Court to recall certain moneys which, in pursuance of a sale, which had taken place in that Court, of the estate in question, had been first lodged in Court and afterwards distributed amongst the several persons who were parties to the discussion before that Court, and ultimately before the Court of Appeal in Chancery in *Ireland*.

Now, the main question arises, as I have said, upon the settlement made upon the marriage of Mr. *Grier* in April, 1822. His wife has survived him, and is still living. The settlement is certainly somewhat singularly framed. It is not framed in the mode in which one ordinarily finds marriage settlements framed, providing not only for the intended wife but for the issue of the marriage, because the recitals deal with nothing but the intended jointure which was to be given to the wife, and nothing whatever is said with reference to the issue of the marriage, until we come to the close of the articles of settlement and to the covenants contained in that closing part of the instrument. The property seems not to have been of very great value compared with some estates; it is a property producing about £180 a year, and the intended jointure for the wife was to be £60 a year. There is a great deal of unnecessary length employed in making the settlement of the jointure; the indenture first recites the intention to make it, and then, in a somewhat verbose mode, carries that intention into effect. There then follow the usual covenants for quiet enjoyment and for farther assurance. And between these two covenants for quiet enjoyment and for farther assurance, comes the clause which has given rise to all the questions which have been discussed before us.

That clause runs thus:—[His Lordship read it, see *ante*, p. 689.]

These are all the words which refer to the matter in question. It is, however, a clear and distinct covenant and agreement. It recites that it has been agreed between the parties that this property shall be settled upon the issue of the intended marriage. And the simple point that we have to determine, and which has

been determined in the Court in *Ireland*, is this: In what manner is that engagement to be carried into effect?

That it is an executory engagement of course is quite clear from the frame of it; and this indenture cannot be construed in any other way, as regards this particular part of the case, than as articles of marriage framed according to the ordinary course, and in a more artistic way than are these articles themselves.

Then the sole question is this: There being no express life estate referred to as that which is to remain or to be implied in the settlor, but there being a simple engagement to settle upon the issue, what would be the direction that the Court should give? Now the Lord Chancellor and Lord Justice *Christian* were of opinion that they were bound by the authority of a class of cases, referring to this subject, to say that an engagement, made upon marriage, to settle upon the issue of the marriage, is in effect an engagement to settle in the mode in which marriage settlements are ordinarily framed when the issue are intended to take thereunder, namely, by a limitation to the first and other sons in strict settlement according to the ordinary form, and after going through the whole series of sons, giving them successive estates tail, the limitation would follow in the ordinary course to the daughters as tenants in common in tail.

But it was said that the Court of Appeal in Chancery has erred in coming to this conclusion, from want of perceiving that the ground of the whole course of decisions in cases of this description has been, that, when upon a marriage being about to take place a life estate is limited to the intended husband, and the remainder is limited to the issue of the marriage, and words are used which, according to the doctrine of the rule in *Shelley's Case*, would, although the life estate would be expressly limited to the father, be considered so to coalesce with that life estate as to vest in him an immediate estate of inheritance, whether it be in fee simple or in tail; then in order to carry into effect the intent, when the document in question consists of articles which are executory, the Court will not allow the actual settlement which has to be made in pursuance of the articles, to be so framed as to bring it within the rule in *Shelley's Case*, or to vest an immediate estate tail in the intended husband, because it has been

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held, and most reasonably held, that it would be contrary to the whole intent of an instrument of this description to create an interest which might be immediately destroyed by the intended husband, the first taker, who might effectually bar his issue, should any settlement be made of that description.

It is quite true that that seems to have been the origin of the Court carrying into effect settlements which were agreed to be made by articles framed in the manner which has been pointed out, namely, by limiting to the intended husband simply an estate for life, and then proceeding to limit an estate in strict settlement either to the heirs of the body or to the issue, or whatever other phrase may be used with reference to the interest intended to be conveyed to the issue of the marriage. But, my Lords, the point does not rest there; because, although that be the object in view on the part of the Courts in directing settlements to be made in this manner, they have also been called upon in cases of this description to construe the meaning of the subsequent limitation for the benefit of the issue of the marriage. And the first question, therefore, undoubtedly is this: are they words used as words of limitation, or are they used as words of purchase? And even if the words would in a deed actually executed be words of limitation, the Courts have said: "We will treat them as words of purchase, when the words are contained in articles which are executory, and in an instrument which is framed with the intent of carrying the deed into execution. We will not introduce the very words themselves, because the very words themselves in an executory instrument would have the effect of words of limitation; but we will read them as words of purchase. And the question we have to decide, is what those words of purchase mean."

That seems to have been decided in the case of *Dod v. Dod* (1), and to have been referred to by Lord *Hardwicke* distinctly in *Hart v. Middlehurst* (2). In the latter case Lord *Hardwicke* had to deal with the expression, "issue of a marriage;" and although in that case there was clearly pointed out, in some of the articles, an intention to put the younger children in the position of takers of the estate in common with their elder brother, because there were distinct suggestions made in the instrument before him with

(1) Amb. 274.

(2) 3 Atk. 371.

reference to the younger children, still Lord *Hardwicke* makes use of this expression: he says, "I have known many cases decided in this Court in which a direction to settle upon the issue has been carried into effect by giving successive estates, which, if the entail be not barred, will carry the estate through the whole issue successively, and so carry into effect that which is presumed, by a long series of decisions, to be the true intention of the parties when they were preparing the marriage settlement." So Lord *Hardwicke* says it would have been, if it had stood upon the word "issue" alone. We find that he is justified in that by the reported case of *Dod v. Dod* (1), and no doubt there were many other cases which are unreported, but which were perfectly within Lord *Hardwicke's* recollection, in which, there being a direction to settle upon issue, the settlement upon the issue was carried into effect in the manner I have described. In *Dod v. Dod* that was exactly the case. There was a certain power to the parent to appoint, and in default of appointment, then a limitation to the issue; and in executing that limitation to the issue a direction was given to carry out the settlement in the mode I have described, giving it to the first and other sons in strict settlement, with remainder ultimately (the daughters being dead without issue) to the right heirs of the father.

I apprehend that you have not solved the question when you simply say that you have arrived at the conclusion that the father is to be reduced to an estate for life, in order that he may not have the power of barring the entail. The Court has still to construe the words used, which, as it has determined, must be taken as words of purchase and not as words of limitation; the Court has still to decide how it will deal with these words of purchase. Therefore in this case, when you find nothing more than an agreement that the intended husband will make a settlement upon his issue, whatever may be done with respect to his life interest, independently of the point whether or not he will not have his whole life in which to fulfil the covenant, I say independently of that, and supposing the bill to be filed immediately, I apprehend that, looking at the few lines I have read, it would be held that this was in effect a series of limitations by way of settlement not to come into *esse* until the death of the tenant for life. They are engage-

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(1) Ambl. 274.

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ments with reference to the remainder after the payment of the jointure, which jointure would not come into effect until after his own death, and, therefore, the proper time for the execution of that covenant would be after his death, although it might be carried into effect by deeds immediately to be prepared under that covenant which would give effect to that life interest and jointure before carrying into effect the limitations in favour of the issue. That being so, it appears to me that the conclusion which the Court of Appeal in Chancery in *Ireland* came to upon the order of the Landed Estates Court was a correct and just conclusion upon the interpretation of the language of this settlement.

As to the other point which has been raised, it seems to me to be rather an idle contention when you come to consider it. The contention is founded upon the facts of this case, those facts being of this kind, namely, the father having died, and having before his death executed a deed-poll whereby, having seven children, he gave to the daughters charges amounting to £700 each, to the younger sons charges amounting to £200 each, and having, subject to these charges, which amounted altogether to £4100, limited the estate, so far as the sons were concerned, to the sons successively in tail male, with a limitation to the daughters, not exactly in the form I have described, but which it is unnecessary farther to consider; and the father having so arranged the settlement of the estate and then having died, and proceedings having taken place at the instance of one of the younger sons in the Landed Estates Court for the purpose of having the estate, sold as an incumbered estate, in order to discharge the incumbrances, and the Court having directed a sale accordingly, and the money having been brought into Court and distributed, as the Court at that time thought the parties were entitled to have it distributed—in payment of the charges in favour of the children, in payment of incumbrances—the question is raised whether or not upon an appeal from that decision and the reversal of that decision, the money could be brought back again into the Landed Estates Court, or whether the right course was not to do that which would have been extremely inconvenient to all parties, namely, to have the money handed back to all those parties to whom it had been paid, and to leave the present claimant, who is the eldest son, to obtain

the money back by means of a Chancery suit by virtue of a clause contained in the Landed Estates Act.

Now I apprehend that the true view of the proceedings of the Landed Estates Court is this : They sell an estate, and when an estate is sold they have to divide the purchase-money among the parties who may ostensibly seem to be entitled. It turns out that some one who has been connected with the suit questions the propriety of the decision which has been come to with reference to the distribution of the money. The policy of the Act is to give a full and complete title to the purchaser. The purchaser has nothing to do with any quarrel that may arise as to the purchase-money. He pays his money into Court and takes his title, which is superior to any difficulty that can be raised—he has a parliamentary title under the Act which authorizes the Landed Estates Court to sell the land and give him a clear and distinct title. But when that is done the policy of the Act is farther to deal with the money in this way : The money is to be distributed by the Court, but, if it has been distributed, and all claims have been settled and disposed of, as is believed, between all the parties, yet it should be found out afterwards that there has been some miscarriage in dealing with the money, then, as a greater security to the person who was originally interested in the estate, but who has been divested of his estate by Act of Parliament, and who cannot go against the purchaser because he has a parliamentary title, the interest of the person who was originally entitled to the estate, and whose interest has been overlooked, is wholly centred now in the money and not in the land. It is, therefore, provided that he shall be able to follow that money, and deal with it in the possession of the person to whom it has been paid, just as the land would have been held to be subject to him who had a real interest in the land. But it was never meant to say that that Court, like all other Courts when administering justice between parties, subject to appeal, should have its decisions appealed against, and should either, by its own decision, if it was a re-hearing, or by the decision of a superior Court, if it was an appeal, have its decision reversed, and yet not be able to recall its order until the cause was finally concluded, because it is not concluded until the appeal has been heard, nor is it concluded until the consequences of the appeal are reached, if they

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are within reach. Of course there may be cases in which it might be difficult so to deal with them. I apprehend that the 39th section of the Act simply applies to that state of things—it merely deals with the case of an appeal being allowed. When the appeal has been heard, and when the result of that appeal has been ascertained, the proper course is to undo, as far as you can, any consequence which may have resulted from the erroneous decision, and which is capable of relief.

It appears to me, then, that the most sensible and the most beneficial course for everybody, including those who have to restore the money, is to have the money brought back in order that it may be subjected to the final conclusion arrived at by the Court, and that the parties should not be put to the expense of having a new suit entered into, when the matter can be remedied by the Court which has already seisin of the cause and jurisdiction over the matter. It seems to me, therefore, that in every respect the eldest son turns out, in accordance with the views of the Court below, with which view I think your Lordships will concur, to have been entitled to the estate, and that eldest son is now entitled to the money brought back, and, accordingly, that the appeal fails in every respect.

I will just mention one point which has been argued by the Solicitor-General, but which really seems to be involved in what I have already said. In itself it would not seem to have much to repose upon in the way of justice or right, namely, the argument that the costs of the sale ought to be deducted as against this gentleman, who is now claiming the money which the sale of the estate produced, because it has been sold, as it is said, for him, and he cannot have the estate sold for his benefit without being subject to the expense of selling it. But this gentleman did not wish the estate to be sold; he wished to have the estate. It has been sold, and the Act of Parliament says that having been sold, sold it must be as regards him and the purchaser. But it does not seem to me to follow as a consequence that he is to be burdened with any of the expenses resulting from the parties selling it without having a title, as it ultimately turns out, to sell it; expenses which have been occasioned in consequence of their desire to have the estate sold, which did not coincide with any desire to have the

estate sold on his part. In order to do justice to him you must give him back, as far as you can, the value of the estate. The estate he cannot have; he would have had it if he could, but the Act of Parliament precludes his having it. The estate has passed away, and the value of the estate, that is, the money which the purchaser has given for the estate, has come in its place, and that he ought to have.

It seems to me that on every point the Appellant fails, and that therefore our only course will be to affirm the order of the Court below, and to dismiss the appeal with costs.

LORD CHELMSFORD :—

My Lords, the first question to be considered in this case is, whether the deed-poll executed by *Robert Grier* on the 5th of September, 1861, by which he charged his estate with different sums of money, amounting in the whole to £4100, for his younger children, and gave the lands themselves in succession to his first and other sons in tail and to his daughters as tenants in common, is a good execution and performance of the covenant contained in his marriage articles of the 15th of April, 1822, by which he agreed to settle the same upon his issue by his intended wife.

It has been observed that the covenant in question is contained in an unusual part of the marriage articles; but this circumstance does not in the slightest degree affect its construction. The question is, whether it warranted the creation of charges in favour of the younger children of the marriage, which by the deed-poll in question the settlor created to nearly the whole value of the property.

It is in some degree a new question, as the cases which have been decided upon executory trusts in marriage articles carried into effect by the decree of a Court of Equity, have little or no application. In such cases the Court acts upon the presumed intention of the parties to the articles, to make such a provision for the issue of the marriage as it would not be in the power of either parent to defeat. And, therefore, where the estate of either parent is by the articles agreed to be settled to himself or herself for life, with remainder to the heirs of the body, or to the issue of the parent who has the estate for life (with certain well known excep-

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tions), the Court, in carrying the articles into execution, will decree it to be done in the surest manner to protect the interests of the children. But in this case *Robert Grier* had no life estate, either by reservation or by implication, which could coalesce with any estate which he might give to the issue of the marriage. He entered into a covenant or agreement that he would settle all the residue and remainder of the estate, after satisfaction of his intended wife's jointure, upon his issue by her. He had the whole of his life in which to perform this covenant; and nearly forty years afterwards, referring to this covenant, and expressing that he was acting in execution and performance of it, he executed the deed-poll by which he charged the estate in favour of his younger children with various sums of money amounting to £4100; and in farther execution and performance of the covenant, settled and conveyed the estate in succession to his first and other sons in tail male, and to his daughters as tenants in common.

Now was this a proper performance of his covenant? The question is not as to protecting the issue of the marriage by giving a meaning to the word "issue," but what would be the construction of the covenant by a Court of Equity if a suit had been instituted for specific performance. The word "issue" in a marriage settlement seems to have acquired a particular sense as applicable to lands, denoting an order of succession of lineal descendants to the estate comprised in the settlement; and by itself, and without some explanatory words to affix to it a different meaning, I think it cannot be interpreted as intending all the issue together and contemporaneously. The deed-poll of 1861 settles the estate exactly in the way that the Court would have decreed the covenant to be specifically performed; but it first gives the value of the estate to the younger children, which was *ultrà vires*. The settlement of the estate itself is therefore good, but the charges are void.

This view of the effect of the deed-poll shews that the proceedings in the Landed Estates Court were, from the commencement, without any foundation. The petition for sale of an incumbered estate must be made to the Court by an incumbrancer; and, accordingly, *John Court Ferguson Grier* petitioned as an "incumbrancer" for the sale of the lands in question. But he was not an

incumbrancer, and therefore there was no valid petition. But a sale of the lands having been decreed by the Landed Estates Court, the decree is final; the lands have been conveyed to the purchaser, and the greater part of the purchase-money has been distributed amongst persons who have no right to it. The second question then arises, whether the proceeding taken by the former owner of the estate, to obtain a decree for a restitution of the money, to which he has an undoubted right, is regular and proper. I do not enter into the question of the supposed delay on the part of *Robert Ferguson Grier*, with alleged knowledge of the deed-poll and of the proceedings in the Landed Estates Court, upon which I agree entirely with the view of the Lord Chancellor of *Ireland*. But it is said that the only mode of obtaining the money to which the Respondent is entitled is, according to the 64th section of the Act, by a suit in Equity. That section provides that if by mistake or otherwise any purchase-money shall have been paid to any person not entitled to it, it shall be deemed to have been paid to him upon an express trust to invest the same in the purchase of lands to be settled to the "uses, &c., upon which the lands sold stood limited and settled at the time of the sale." It appears to me that by this proviso a trust is fastened upon the person improperly receiving the money, for the benefit of the person entitled to it; but I find nothing in the section to prevent the person to whom the money belongs from having the money itself if he prefers it. The preceding part of the section enacts that the Court shall, out of the purchase-money, pay the costs and expenses, and the incumbrances, and the surplus to the owner, if absolutely entitled thereto; or, where not so absolutely entitled, to be laid out in the purchase of land. The proviso, therefore, taking the whole section together, must be confined to the case of an owner not absolutely entitled to the money. The 39th section enables the Court to rescind or vary any order which has been previously made, without any limitation as to time; consequently, when the Respondent discovered that money which ought to have been paid to him had, by an order of the Court, been wrongfully received by a person who had improperly set the Court in motion, he had a right to resort to the Court and ask it to redress the injustice which it had unconsciously committed, and enable him to obtain a restitution of

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the money which, if the Court had known the truth, it never would have ordered to be paid. I think that the order appealed from ought to be affirmed.

LORD COLONSAY concurred.

LORD CAIRNS:—

My Lords, if after the marriage this case had arisen,—if some person had come into being who was interested in the performance of this covenant, and a bill had been filed in the Court of Chancery for specific performance of the covenant, no doubt can be entertained but that the Court of Chancery would have directed a specific performance of the articles by ordering the settlement of the estate in question to be made according to the proper construction of the words in the covenant. The Court of Chancery would not have left the question to remain upon the covenant, although in executing the articles it would not have taken away from the husband of the marriage any interest which he might have been entitled to retain during his life. On that question, my Lords, I apprehend that there can be no doubt.

Neither do I think there can be any doubt but that in directing a settlement of the property the Court of Chancery would have reserved to the husband an estate for his life, and would not have created immediate interests in the children. That is itself a provision which is of the essence, one may say, of a marriage arrangement of this kind; and the strong *à priori* probability of such a provision is put beyond doubt in the present case by the form of the covenant; because whatever interest was to be raised in favour of the issue was to be an interest in the property after payment of the jointure to the wife, a jointure which, of course, was not to begin until the death of the husband. I think, therefore, that the second point is as clear as the first, and that the Court of Chancery, in executing these articles, would have retained to the father, or given to the father, by way of use or resulting use, a life interest in the property.

My Lords, the next point, which does not seem to me to admit of doubt, is this; that in executing this provision in the marriage articles the Court of Chancery would have made, under the term

“issue,” a provision in some way or other for the whole of the children of the marriage, both male and female.

Then the fourth point is equally clear, that a provision for the children of the marriage, male and female, would have been made by the Court of Chancery by raising and creating estates tail; because otherwise the first line only would have been provided for, whereas the term “issue,” as we know, includes descendants *ad infinitum*.

Now these points being, as it seems to me, beyond all doubt, the only question in the case which then remains to be determined is this: would the interest thus created by way of estates tail in the children of the marriage have been created by giving estates tail to the children concurrently, or would it have been created by giving estates tail to them successively? In either case you provide for the children of the marriage or the issue of the marriage, *ad infinitum*. Of course the results practically may be extremely different, according to whether they take their estates tail in the first instance concurrently, or whether they take those estates tail successively.

Now in solving that, which is the only difficulty in the case, I entirely agree with the observation made in the Court below, that great weight is to be attributed to the term which is used, namely, “settle.” As I understand that word it must mean this, that the husband agrees to settle—that is to say, to make a settlement of—the property upon the issue of the marriage. And that being the meaning of the word “settled,” I hold it to be an established rule, established by a line of cases which cannot be overthrown now except by legislation, that when, after a life estate is either given or reserved to the father upon the occasion of a marriage, there is a contract to make a settlement of real estate upon the issue of the marriage, that must be effected by giving successive estates tail to the children of the marriage. My Lords, that is well settled by the cases referred to in the judgment of the Court below. And if we were curious to know what the reason of these decisions has been, it seems to me that the reason is perfectly clear, and it is this—that the rule which the Court of Chancery has laid down for itself is, in limiting estates by way of purchase to the issue of a marriage, to go as near as possible to that line of

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devolution of the property which would have taken place if the father in the first instance had remained the proprietor of an estate tail. In that case the estate would have gone first to the sons in succession, and then to the daughters as heirs of tail together. And while the Court of Chancery secures to the children estates by way of purchase, which cannot be defeated by the parent, it preserves at the same time the line of devolution, *cy-près*, as near as possible to that line which would have been followed if the father had taken first an estate tail.

My Lords, the authorities appear to me clearly to establish that proposition; and I should not desire to express my reasons for the conclusion I arrive at in words more apposite than those which are used by Lord Justice *Christian*. He says: "How, then, would the Court of Chancery execute the articles of 1822? I shall not recapitulate the familiar cases that were referred to during the argument. The Respondent's counsel objected that they were mostly of the class referred to by Mr. *Fearne* in treating of the rule in *Shelley's Case*, and that what they shew is what estate the father shall *not* take, not what estate the issue *shall* take. But in my mind they shew both these things—that is to say, that the estate tail, which must be lodged somewhere, shall *not* be raised in the father, but *shall* be raised in the children, and in order of seniority, 'issue' in such articles like 'heirs of the body' meaning all lineal descendants, and an estate in tail supplies the only legal mechanism by which the subject can be carried down through that line; that estate must not be raised in the father, the authorities are clear upon that. Only two other methods are open, viz., either to the first and other sons successively, according to seniority, in tail, remainder to the daughters in common in tail, with cross-remainders between them; or else to all the children, male and female, in common in tail, with cross-remainders. The former I take to be the established form of limitation in the absence of express provision to the contrary."

Well, my Lords, having disposed of the only question in doubt in the case, I merely observe farther, that the deed in this case, executed by the father in 1861, is a deed which created in the eldest son an estate tail (we need not go farther than that for the present purpose), and so far it was a good execution of the articles.

But, in my opinion, so far as, beyond that, it imposed charges in favour of the younger children that deed can in no view of the case be supported. It could not be supported if the proper construction of the articles was to require a tenancy in common in tail of all the children. It could not be supported if the proper construction of the articles was that there should be a tenancy in tail of the eldest son, because it has been well decided that where there is a contract merely to settle upon the eldest son as heir of tail, there is no power in the Court to award portions to the younger children, unless there is in the articles some provision for that purpose, or some reference to some other document which can enable the Court to ascertain what the amount of such provision ought to be.

My Lords, I think, therefore, that in substance the decree of the Court of Appeal in Chancery in *Ireland* declaring that the charges made by the deed of 1861 were invalid, and that the eldest son became on the death of his father tenant in tail, was entirely correct.

My Lords, as to the question of procedure which has been raised in this case, it appears to me to admit of no doubt. Beyond all question the object of the *Landed Estates Act* was to effect a sale of incumbered estates as soon as possible, and to give to the purchaser an absolute indefeasible title, which nothing could take away from him. Beyond that—there was no object whatever in giving a parliamentary title to the persons among whom the money was distributed. Those persons took their money under the Act as if they took it under a decree of the Court of Chancery, to which they were all parties. An appeal is given by the Act against an order of the Landed Estates Court distributing the money, but that appeal would be perfectly illusory and nugatory unless the Court of Appeal had the right of undoing and setting straight what the Court below had done. It is of the essence of a right of appeal that the Appellate Court should have the power to bring back anything which has gone astray under the order of the Court below, that it should have the power to bring back money which has been paid to a wrong hand, and to put that money into the right hand. In this case it appears that in substance the persons among whom the money was distributed were parties to

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the whole proceeding. I find that upon the present appeal before your Lordships, with the exception of one or two persons, the Appellants are the very persons who received the money. Those who received the whole bulk of the money are here at your Lordships' Bar as Appellants, and they were before the Court of Appeal in *Ireland* as Respondents, disputing that construction of the articles which was alleged by the Appellant there.

My Lords, that being so, I cannot understand how it can be contended that persons who have received the money under a decree that is challenged, shall appear and endeavour to support that decree, and that then, when they are defeated in supporting that decree, they shall say that the Court of Appeal, before which they are arguing, has no right to take back the money which, by a mistake of the Court below, has improperly come into their hands. I say, I cannot understand how such a proposition can be gravely argued at your Lordships' Bar. It appears to me that the decree of the Appellate Court in *Ireland* has reserved entirely the rights of any persons who have got the money, and who have not been in substance parties to the proceedings, and allows them to make any defence to which they may be entitled. None of them appears at your Lordships' Bar, and therefore their rights may rest protected as they were left by the decree of the Court below.

I think, my Lords, upon these grounds, that the motion of my noble and learned friend on the woolsack is the correct motion to be made in this case, and that the appeal should be dismissed with costs.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, July 18, 1872.

Solicitor for the Appellants: *E. Walmesley, for S. & R. C. Walker, Dublin.*

Solicitors for the Respondent: *Lawrence & Graham, for A. H. Goddard, Dublin.*

FRANCIS WEBB AND OTHERS, TRUSTEES OF }
 THE BRITON MEDICAL, &C. ASSOCIATION. . } APPELLANTS;

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AND

GEORGE WHIFFIN AND OTHERS, LIQUIDATORS }
 OF THE ACCIDENTAL, &C. INSURANCE COR- } RESPONDENTS.
 PORATION (LIMITED) }

*Companies Act, 1862—B List of Contributories—No Special Application of
 their Contributions—"Assets"—Property.*

In a winding-up, the funds contributed by the B list of shareholders become part of the general assets of the company, and are not to be applied, preferentially or exclusively, to the payment of those debts which were incurred before the B shareholders retired from the company.

The 38th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), makes the "past members" (persons who have become so by retiring from the company within a year before the date of the winding-up order) liable to contribute to the assets of the company for the payment of the debts and liabilities of the company, but though they are not specifically liable to satisfy debts which have been contracted since they left the company, yet, when they have become liable to contribute to the assets of the company, and have so contributed, their contributions become part of the general assets, and cannot be appropriated exclusively to the payment of those debts which had been incurred before these members retired from the company.

The word "assets" in the 38th section of this statute means the same as the word "property" in the 133rd section, and both alike mean all the unpaid capital recoverable as well as the other property of the company.

Observations by Lord Cairns on the duty of the liquidators in making calls on the past members of a company.

THIS was an appeal against an order of Lord Justice Giffard, by which a previous order of Vice-Chancellor Stuart had been affirmed.

The *Accidental and Marine Insurance Corporation, Limited*, was formed of other companies originally established under other names, which had been duly registered and incorporated under the 7 & 8 Vict. c. 110. By these previous companies were issued on the 9th of March, 1858, and the 10th of May, 1859, two debentures, for the sums of £680 and £170 respectively, in favour of John Weston. The *Accidental and Marine Insurance Corporation* was itself registered on the 5th of August, 1865, under the 25 & 26

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Vict. c. 89 (the *Companies Act*, 1862), and assumed the credits and liabilities of the former companies. The debentures held by *Weston* passed by assignment to *Webb* and others, as trustees of the *Briton Medical and General Life Association*.

On the 24th of October, 1866, resolutions were passed for a voluntary winding-up of the *Accidental and Marine Insurance Corporation*, and on the 3rd of November, 1866, an order was obtained that it should be wound up under the supervision of the Court.

Webb was admitted as creditor of the corporation for the sum of £850, the amount of the two debentures, and interest at the rate of 6 per cent. per annum from the 21st of September, 1867. Dividends of 2s., 1s. 6d., and 6d. in the pound respectively had since been paid by the liquidators, whereby the amount of the principal had been reduced to £680.

The existing members of the corporation were at the time when the corporation came to be wound up unable to satisfy the required contributions. The past members of the corporation were therefore put into a B list, and considerable sums had been received from them.

The debt, for the balance of which the Appellants are now creditors of the corporation, was contracted before the time at which any one of the "past members" ceased to be a member of the corporation.

On the 10th of March, 1870, Vice-Chancellor *Stuart* refused with costs a motion by the Appellants that the liquidators should divide the contributions received from past members amongst such of the creditors only who became so before the past members had ceased to be members of the corporation. On appeal, before Lord Justice *Giffard*, the decision of the Vice-Chancellor was affirmed (1). The present appeal was thereon presented to this House.

Mr. *Greene*, Q.C., and Mr. *Holl*, for the Appellants:—

The question here is upon the construction to be put on the 38th section of the *Companies Act*, 1862. The words of the statute have been considered in other cases, but not precisely with the purpose of determining the question raised here. Those cases, however, point to the construction for which the Appellants con-

(1) Law Rep. 5 Ch. Ap. 428, *nom. Re Accidental and Marine Insurance Corporation*.

tend. Here is a company which is the subject of a voluntary winding-up. The debts found to be due cannot be satisfied by the contributions of the "existing members," those who were members when the winding-up was resolved on. The liquidators have therefore, formed what is called a "B list," that is, a list composed of persons who had retired from the company, but had not retired more than a year before the winding-up. By the 38th section of the 25 & 26 Vict. c. 89, every present and past member of a company which is being wound up is declared liable to contribute to the assets of the company an amount sufficient for the payment of its debts and the costs, but that liability is to be subject to certain qualifications. These are contained in seven sub-sections, the first of which declares that no past member shall be liable if he has retired more than a year; the second that he shall not be liable to contribute in respect of "any debt or liability of the company contracted after the time at which he ceased to be a member:" the third says that "no past member shall be liable to contribute to the assets of the company unless the existing members are unable to satisfy the contributions required." On these enactments the contention of the Appellants is that the contributions of the past members are to be exclusively devoted to satisfy the debts to which the company was liable when these members retired from it. The existing members are to be liable in the first instance, for they have taken possession of the assets of the company; and having secured its advantages must support its burdens. But the Legislature desired to protect the creditors of the company, and therefore, intending that men should not engage in speculations, thereby incur debts, and then suddenly abandon the speculations, and leave the creditors in the lurch, directed that unless they had retired for above a year they should be liable to contribute to the payment of the debts existing when they retired.

By the ordinary law of partnership a man who ceased to be a partner would be liable to the debts created while he was a partner, but to none created afterwards. The Legislature adopted that principle, but adopted it with modifications suited to the conduct of public companies. If a man quitted a company the man who succeeded him would be, in the first instance, liable to all the debts unpaid at the time when the company was declared to have failed,

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that is, when it was to be wound up. But he, the existing partner, might not be able to pay all the debts, so it was enacted, in favour of the creditor, that the partner who had quitted the concern within a certain limited period should be liable to contribute to the payment of the debts, but only of the debts which had been incurred while he was a partner. That was the chief object of the statute, and that was the interpretation which the Appellants contend that the statute ought to bear. The liability of past members, and the claims of what might be called past creditors, were in direct relationship with each other, and that relationship was exclusive. It did not and could not exist as to creditors who came in afterwards. On that principle *Brett's Case* (1) had been decided. *Brett* bought up all the past debts, that is, all those which existed when he ceased to be a shareholder, and it was held that no call could be made on him for any others. This case had then been decided (2), and was mentioned but not approved of there, or in *Morris' Case* (3), which followed and adopted the principle in *Brett's Case* (4). There Lord Justice *James* observed that "the liabilities of the ex-shareholders and the rights of the creditors who were creditors at the time when they ceased to be shareholders concerned only those two classes." The 102nd section of the *Companies Act*, 1862, is relied on by the other side. That gives the power to the Court to make calls before as well as after ascertaining the sufficiency of the assets of the company, but that has nothing to do with any particular classes of contributories, the contributions they are to make, or the special application of those contributions. The 133rd section is also relied on by the other side. That relates to the consequences ensuing on a voluntary winding-up. The 1st sub-section there says, that "the property of the company shall be applied in satisfaction of its liabilities *pari passu*." No doubt the contributions of each class are to be distributed among the creditors of that class *pari passu*, but not among all the classes of creditors. The 9th sub-section is plainly one which treats exclusively of the liabilities and contributions of those who are *primâ facie* liable, that is, the existing members, to satisfy the debts of the company, the last part of the sub-section

(1) Law Rep. 6 Ch. Ap. 800.

(3) Law Rep. 7 Ch. Ap. 200.

(2) Law Rep. 5 Ch. Ap. 428.

(4) Law Rep. 6 Ch. Ap. 800.

expressly speaking of the liquidators taking into consideration the probability of the contributors being unable wholly or in part to pay, a consideration which, in the ordinary course of things, must be antecedent to the formation of a B list. The 98th section, which enacts that the Court shall cause the assets of the company to be collected and applied in discharge of its liabilities, only lays down a general proposition, but does not in any way say that the contributions of the old members, who have retired, shall be employed to relieve the liabilities of the existing members as to debts incurred since the retirement of the old members. A different rule from that which the Appellants contend for would be, in fact, making them contribute to the payment of liabilities from which the 38th section itself has expressly exempted them, whereas the plain meaning of the words is, if you are not liable to the debts you shall not contribute to the payment of them.

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Mr. *J. N. Higgins*, Q.C., and Mr. *R. Romer*, for the Respondents:—

The point here is short and simple. The statute intended to afford protection to creditors, and therefore made not only all the existing members of a company liable to contribute to the assets of a company on its being wound up, but provided that if their contributions should not be sufficient to satisfy the debts, then that other and older members, their transferors in short, should be made liable to assist them. But the Legislature imposed this liability with a restriction. It was confined to members who had retired not more than one year before the winding-up. These recently retired members were made liable to contribute. But to contribute to what? To the assets of the company, not to any particular assets; not to assets which were to be employed in the payment of the particular claims of *A.*, *B.*, and *C.*, but to the general claims of the creditors of the company, all of whom were to be paid *pari passu*. There was no selection by the statute of any particular creditors to be satisfied out of any particular fund. All the creditors were, if possible, to be satisfied, and all the members of the company who had been members within a certain date, before the period of the order for winding-up, were made liable to be called on to satisfy them.

The assets thus contributed are general assets. If not, what are

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they? There is nothing in the statute which assigns them to a particular purpose or directs them to be employed in a particular manner. The past member may not be required to contribute anything; but when the existing members are unable to pay the debts of the company, certain of the past members become liable to be called on to assist in doing so, and not for the purpose of satisfying any one class of creditors, but of contributing to the assets of the company to satisfy the liabilities of the company. *Brett's Case* (1) merely shews that if there were no debts at all when "past members" retired, such past members may not be called on to contribute to debts which have been wholly incurred since they retired; but it does not shew that if they are liable to be called on, what they do contribute shall be exclusively applied to debts contracted before they retired. In *Andrews' Case* (2) the principle was considered, but cannot be said to have been decided, nor was it decided when that case afterwards went before Lord Justice *Rolt* (3), except that he expressed an opinion against the idea of marshalling assets in such a case. In *Helbert's Case* (4) the Master of the Rolls expressly said that past members liable to contribute at all were liable to contribute to "all the debts and liabilities 'of the company and the costs,'" and his decision was affirmed in this House (5).

The case was ordered to be argued a second time before a larger Court, and it was again argued on July 8, and then before the Lord Chancellor (Lord *Hatherley*), Lord *Chelmsford*, Lord *Westbury*, Lord *Colonsay*, and Lord *Cairns*.

Mr. *Greene*, Q.C., and Mr. *Holl*, were again heard for the Appellants, and repeated the arguments which they had before addressed to the House, on the principles of construction to be applied to the statute, and on the cases already decided. They farther illustrated their arguments by reference to similar provisions in other statutes. The statute meant to say to past members, If you are not liable to debts you shall not contribute to them. They were not liable to debts contracted after they left the company, and therefore their

(1) Law Rep. 6 Ch. Ap. 800.

(3) Law Rep. 3 Ch. Ap. 161.

(2) Law Rep. 4 Eq. 458.

(4) Law Rep. 6 Eq. 509-511.

(5) Law Rep. 5 H. L. 31.

contributions were not to be employed in the payment of debts so contracted. To make them liable would simply be to impose liability on them in order to relieve the existing members.

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Mr. *Higgins*, Q.C., and Mr. *R. Romer*, for the Respondents, relied on the 133rd section of the statute, as presenting with regard to this case an essential difference between it and *Brett's Case* (1). No principle applicable to a common law partnership applied here; this was a statutory liability, and could only be governed by the rules which the statute had created, and the statute made no separation of the fund into classes when the fund had once been constituted.

Mr. *Greene* replied.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, this is an appeal from an order of the late Lord Justice *Giffard* affirming a decision of Vice-Chancellor *Stuart* with reference to the position of the claim of a certain class of creditors of a joint stock company which was being wound up. The claim of those creditors has been to be paid to the exclusion of the subsequent creditors of the company, by means of the sums which are recoverable from a class of shareholders who are ordinarily in these cases called B shareholders, namely, shareholders who, having retired within a year from the company, remain still liable in respect, at all events, of debts accrued anterior to the time of their ceasing to be members of the company. The question which the Appellants raise is this—they say that, by the true construction of the Act of 1862 with reference to joint stock companies, and especially with reference to the construction of the 38th section of that Act, inasmuch as the persons who have retired from the partnership are not to be called on to contribute to the debts which have accrued since their retirement, therefore the sums which they do contribute ought to be paid and applied in satisfaction of those debts which had accrued before their retirement in preference and priority to any payment to creditors who had become so subsequently.

The question arises entirely upon a clause, which is not very

(1) Law Rep. 6 Ch. Ap. 800.



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happily worded, in the 25 & 26 Vict. c. 89, the *Companies Act* of 1862. There are directions, in the first instance, that all the shareholders shall contribute to the assets of the company for the payment of the costs and of the debts of the company. These directions are in the largest and most general terms. Then there are exceptions made by the 38th section with reference to that generality of expression. The first exception is that no person shall be a contributor who has ceased to be a partner for a year before the winding-up. That exception, in fact, takes the whole class of persons who have ceased to be shareholders for a year altogether out of the category of persons who are to pay. Then, secondly, in the case of limited companies, no persons are to pay more than the amount of the shares which they subscribed for. That exception, of course, one would expect to find from the nature of the company, it being a limited liability company. Then there is another provision, that none of those who have ceased to be members of the company within a year—that is to say, that none of those who are said to be on the B list—is to contribute until those who remained members of the co-partnership up to its expiration—that is, persons who constitute the A list—have been exhausted. Then, lastly, comes the provision which has occasioned such difficulty as has arisen in the present case, namely, that those who are on the B list shall not be called upon to contribute in respect of any debt accrued since their ceasing to be members of the company. Then, as regards the assets, when a fund has thus been formed, and there has been this general contribution to the assets, it is provided that the assets are to be distributed, first, in payment of the costs; and, secondly, in payment *pro rata* of the several creditors of the company, in which provision no distinction is made as to those who have been creditors at one particular period as distinguished from another particular period.

I have no doubt, that in making provision with respect to the assets of joint stock companies, and especially the assets of limited companies, many circumstances have to be considered which take the case out of the ordinary rule as to the distribution of the assets of a partnership. There is the circumstance that the members of the company have the power of parting with their shares, and

thereby escaping, after a certain period, at least, from all liability; a state of things entirely contrary to that subsisting in an ordinary partnership. In an ordinary partnership, a person who has once become a partner cannot escape from any liability whatever for the debts by his ceasing to be a member of the co-partnership, except by payment of the debts. That was a point in which it was necessary to distinguish the members (sometimes called the partners) in a corporation or company of this kind from members of ordinary partnerships. The Legislature has been desirous from time to time of encouraging joint stock companies, by giving great facilities for the transfer of shares, which, of course, is a great encouragement to people to enter into companies of this kind, if they are disposed to enter into them at all. One encouragement the Legislature has given is, that of persons being able, on parting with their shares, to relieve themselves, as far as the Legislature allows, from liability in respect of those shares. In the several Joint Stock Companies Acts which preceded the Act of 1862, provisions seem to have been made which recognised, far more distinctly than this Act appears to do, or than the framers of it appear to have desired to do, the analogy of a member of a company to a member of a partnership, and which did make, as it appears to me, a more accurate provision for the distribution of the contributions of its members.

However, when we come to this Act we can only deal with it as we find it, and must act expressly according to the provisions which it contains. Some construction, of course, must be given to those words which say that the old members, the past members, the members classed in the B list, who have parted with their shares within a year anterior to the winding-up of the company, and who are therefore not placed upon the A list, although they have to contribute in some shape or way, yet are not to contribute until all the A list has been exhausted, and are not to contribute to the assets in respect of any debt which may have accrued since they ceased to be members. I apprehend that it is very difficult to give any construction to those words, and I shall be very cautious in all I say upon the subject, inasmuch as I would rather confine myself to the express point we have before us, than enter into any speculation as to what may or may not be the construction of the

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Act in other respects. But with reference to *Brett's Case* (1), which was brought before me sitting with the present Lords Justices, and upon which we pronounced an opinion, or a decision, I still continue of the same opinion as far as that is concerned, that you cannot, directly or indirectly, compel the B shareholders to make any contribution to the assets of the company in respect of, or on account of, any debts that may have accrued since they ceased to be members of the company. In other words you must, as regards them, in raising contributions from them to the assets of the company, whatever you may have to do as regards the costs of the winding-up (that is a matter to be considered hereafter), put wholly aside the amount of debt, whatever it may be, that has accrued since they ceased to be members. You have only to consider the debts that existed at the time of their being members, and if those debts are paid, then there is no liability upon them whatever, except as to any possible question that may arise as to the costs. And if they guarantee or secure the company against the debts owing when they ceased to be members (which was the case we had before us), by purchase or otherwise, then they remove out of the way the whole matter (subject to the question of costs) in respect of which they have at all to contribute.

But, my Lords, it does not appear to me at all to follow as a consequence from that, that because their contribution is limited, in the first place, to the extent of the unpaid money due upon the shares which they have transferred, after you have exhausted the means of their transferees and all other A shareholders, and they have to pay in to the fund only that which may be due from them in respect of debts owing at the time they ceased to be members, therefore, what they do so pay in is necessarily to be applied in payment of those debts only which existed at the time they were members. For although it may seem a somewhat singular provision that their liability shall be so limited, and yet that the money they pay in shall not be applied in the direction in which the limitation of their liability would seem to point; yet, on the other hand, looking to the clauses of the Act of Parliament carefully, you find that no mention is made of anything but the assets of the company in a general form. The assets of the company of course

(1) Law Rep. 6 Ch. Ap. 800.

include all contributions which you are entitled to raise from the members, and these B members are liable to contribute in respect of all the shares they had parted with, in so far as those shares are not paid-up shares, or in so far as the A contributories have not been able to raise funds sufficient for the payment of all the debts of the company. When that is done, a common fund is formed, and you find no direction in the Act whatever, except for the distribution of the common fund so formed.

Then let us see what that distribution is. That distribution is only among all the creditors of the company, without any distinction of class between them. Of course reasons might be given for this, and one must assume that there were reasons for the Act being framed in this way. The Act was so framed as to say, You, the B contributors, shall stand as sureties, as it were, for the company to the public, that is, to those who are dealing and trading with this company; you shall stand as sureties for the formation of a fund towards the payment of the debts, by means of the payments required from you in respect of the shares which you have only parted with within a year. It shall be your business to see that you part with them only to persons of sufficient means to be able to meet the debts which may become due in the course of the year. If you do not do that you shall stand as sureties at least to the extent of making good what may be due upon those shares, or at least to the extent of making it good in respect of all debts that existed while you were a member. We shall not call upon you to remain liable for debts contracted after you parted with your shares, for that would very much indeed depreciate the advantage of being able to part with the shares. We will not call upon you to answer for all that happened after you ceased to have a control over the expenditure of the company; but we will say, to the extent of the debts owing at the time you left the company, you shall make good the payment as far as the shares you once held are concerned, and as far as the debts are concerned which you were liable for at the time you left the company. There may be reasons for saying that, without going on to say that the assets which you so pay are to be appropriated only to the payment of the particular debts due to those creditors who were creditors at the time you ceased to belong to the company. They have not chosen

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to call in those debts, they have taken their chance of the solvency of the company as long as it should continue to exist, and there is nothing irrational, at all events, in saying to them, You must come in for a share of the results of the calamities which have befallen the company in common with all the creditors of the company who were creditors at the time of the winding-up, without having any special preference given to you in respect of those sums which have been contributed by persons who were members of the company at the time you became creditors. There is no necessary reason why, unless it is expressly so stated in the Act, a distribution should be made to them from the fund contributed by the B shareholders in preference to the remaining creditors who became so subsequently to the retirement from the company of the B shareholders.

What has satisfied my mind most is, that there is no machinery provided for that purpose in the Act. I do not think that is so wholly conclusive as it appeared to be considered by the learned counsel in the course of the argument, for one reason, namely, that there must be some sort of machinery provided, I apprehend, in whatever way the Act is construed, with regard to the shareholders who cease to be shareholders at different times. Because shareholders of Class B, who cease at different times to be members of the company, are, each of them, to be exempted from contributing in respect of any debts that were contracted after they left—and you might go through all the letters of the alphabet, and say X. ceased to be a member at one time, Y. at another time, and Z., again, at another time—there would be a different amount of debt due at the time of each of those persons ceasing to be a member, and there would, therefore, be a different amount in respect of which each of them respectively would have to contribute. That question may have to be disposed of hereafter. I cannot say that I think the Act extremely easy of construction under any circumstances whatever; but I think I can see my way to this, that there is no special charge given upon the particular assets contributed by the B shareholders to those who were creditors at the time the B shareholders were members of the company, but who continued to be creditors afterwards, and allowed their debts to remain unpaid until the common disaster came, and who, as it appears to me, can only dip into the common

reservoir which is to satisfy the claims of all those creditors unpaid at the time of the winding-up. I think the mistake has been to consider that because, on the one hand, the liability of the B shareholders is limited by the debts owing by the company at the time of their ceasing to be shareholders, therefore, on the other hand, the amount which they contribute must be paid to those persons only who were creditors of the company at the time of their ceasing to be members of it, and who so continued until the winding-up.

I think, therefore, that the judgment of the Lords Justices, affirming the decision of the Vice-Chancellor, is correct, and that being so, that this appeal must be dismissed with costs.

LORD CHELMSFORD:—

My Lords, the question raised by this appeal is, whether the contributions received from contributories in Class B (that is, from persons who have not ceased to be members of the company for a period of one year prior to the commencement of the winding-up of the company) are to be appropriated exclusively to the satisfaction of the debts contracted whilst they were members of the company, or to form part of the assets of the company, to be applied generally in liquidation of all the debts due at the time when the winding-up commenced. This question cannot be determined upon any principles derived from the ordinary law of partnership; the answer to it is only to be found in the provisions of the *Companies Act*, 1862.

In examining the few sections of the Act which apply to the case, it will be seen that they do not deal with the rights of creditors, but regulate and limit the liabilities of shareholders of the company. It is necessary to advert to this, because it is the creditors who are here contending that the liquidators ought to be directed to divide the contributions received from the B contributories amongst such only of the unpaid creditors of the corporation whose debts were contracted before the respective times of such contributories ceasing to be members of the corporation. The 38th section of the *Companies Act*, 1862, enacts, that “in the event of a company formed under the Act being wound up, every present and past member of the company shall be liable to contri-

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bute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves." Nothing can be more general than these words, embracing, as they do, all present and past members, and rendering them all liable to contribute to the assets of the company, not to be applied differently with any reference to the two classes of shareholders, but, as to both past and present members, to the payment generally of the debts and liabilities of the company.

In the different sections which speak of the liability of the contributories, the expression used is, "to contribute to the assets of the company," as towards a common fund to be afterwards applied in the manner directed. The 133rd section enacts that the property of the company shall be applied in satisfaction of its liabilities *pari passu*. The word "property" means the same thing as "assets" of the company, and, as Lord Justice *James* says, in *Morris's Case* (1), the company's assets include all the unpaid capital recoverable from the shareholders. The past shareholders, therefore, are liable to contribute to the assets of the company, to the extent of the amount due upon their shares, towards satisfaction of its liabilities *pari passu*.

But this liability of a past shareholder is limited in the 38th section of the Act by the three following (amongst other) qualifications: 1st, when he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up; 2nd, he is not to be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member; 3rd, nor unless it appears that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act. The difficulty in the case arises upon the second qualification of a past member's liability. What is the meaning of his not being liable to contribute in respect of any debt or liability contracted after the time at which he ceased to be a member? By the preceding part of the 38th section a past as well as a present member is made liable to con-

(1) Law Rep. 7 Ch. Ap. 204.

tribute to the assets of the company for payment of its debts and liabilities; and by the 133rd section the property (which we have seen includes the sums due from the shareholders) is to be applied in satisfaction of the liabilities *pari passu*.

There is no marshalling (as it has been improperly called), by the Act, of the contributions of the past members to the payment of the creditors who were such before they left the company, nor are the creditors distinguishable from the rest as creditors of the past members, but all the contributions of both the present and past members are to be carried to a common fund called the assets of the company, and to be applied in satisfaction of the debts and liabilities, not of the members, but of the company. The liability of a past member to be placed upon the list of contributories must be determined in the case of a voluntary winding-up at the time of the resolution authorizing such winding-up. If at that time there are any debts and liabilities existing which were contracted while he was a member, he appears to me to be made liable by the Act to contribute, not specifically to the payment of those debts and liabilities, but to the assets of the company, to be applied generally in payment of its debts and liabilities. If at the time of the commencement of the winding-up there were no debts or liabilities of the company but those contracted after the time at which he ceased to be a member, the past member would be free from liability to contribute to the assets of the company. But when once upon the list of contributories upon the ground of the existence of unsatisfied debts and liabilities which were contracted while he was a member, I confess that I am unable to see how any dealing with those debts and liabilities, even to the extent of extinguishing them, can discharge a liability to contribute to the assets of the company which had already attached upon him. The argument of the learned counsel for the Appellants failed to establish the analogy between the statutory liability of a shareholder in a company and of a partner in an ordinary partnership, and also the alleged right of the Appellants to have the past members' contributions applied to the payment of their debts in preference to the other creditors. The liability created by the Act is entirely different from that which exists amongst partners, either *inter se* or with relation to creditors; and the Act, in dealing

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with past members of a company, regulates only their liabilities, and makes no provision for the adjustment of the rights of the creditors of the company as to them.

With respect to the costs, charges, and expenses of the winding-up of the company, there appears to me to be no difficulty. These costs, charges, and expenses are to be payable out of the assets of the company in priority to all other claims. The official liquidator must make calls upon both classes of shareholders to an amount in his judgment sufficient for payment of all the liabilities. The calls upon the existing shareholders are to be first applied in payment of the costs, charges, and expenses of the winding-up. If the amount called for to the whole extent of the liability of this class of shareholders, or their ability to satisfy the calls, is insufficient for this purpose, then, and then only, the past members can be required to contribute, so that there can be no apportionment between these two classes of shareholders with respect to their liability upon this ground. In this case, and also with respect to the payment of the debts and liabilities, the past members of the company are liable only in the event of the existing members being unable to satisfy the contributions required to be made by them in pursuance of the Act.

I think the order appealed from must be affirmed, and the appeal dismissed with costs.

LORD WESTBURY:—

My Lords, this appeal is an attempt to derive from certain clauses in an Act of Parliament relating to joint stock companies (the Consolidating Act of 1862), which are applicable only to the shareholders or partners in a company, and regulate the rights and liabilities *inter se* of those partners, a special conclusion, having the effect of appropriating a particular fund to the payment of a preferential class of creditors. Now that would be an entire abuse of the Act. The Act was not intended for any such purpose, nor is any such conclusion legitimately to be derived from it. The Act of Parliament was framed, not with reference to the creditors particularly, but with reference to the rights of the shareholders in partnerships of a more extended character.

By the ordinary law of partnership, as it existed previously to

these Acts of Parliament, which originated, partially, a long time ago, but which are now consolidated in the existing Act of 1862, two things could not be done. In the first place, a partner could not transfer to another person his share in the partnership. Even if he attempted to do so with the consent of the other partners, it would not be a transfer of his share, it would be in effect the creation of a new partnership. Secondly, by the ordinary law of partnership a partner remains subject to the whole extent of his fortune to the liabilities contracted by the partnership. The Legislature thought that those difficulties in the way of company partnerships ought to be removed, and accordingly set to work in order to create conditions under which a partner in a company might have the power of transferring his share and making the transferee a member of the company or partnership in which he previously stood as a member. Thirdly, the Legislature desired to give the power of limiting the liability of partners, and that was done by one or the other of two or three modes, but ordinarily by making the liability of a partner extend only to the share that he took in the company or partnership which was formed under the Act. But then it became necessary to impose certain conditions upon the right of transfer; because of course it was felt that it would be impossible to permit a man to leave a company that was in a state of insolvency, and to exempt himself from all future liability.

The 38th section of the Act of 1862 is addressed entirely to the last named difficulty, and it is impossible, consistently with justice, to arrive at any conclusion that it is to be applied to a purpose which it did not at all contemplate or think of, and which would be repugnant to other parts of the Act, namely, the purpose of creating, by the rules given touching the liability of past members, a peculiar fund that should be applied exclusively in favour of those creditors who were creditors at the time when each transferring partner left the partnership. The limitations which the Legislature imposed were these:—A man making a transfer at a time which does not precede by a twelvemonth the order for winding up, or the voluntary agreement to wind up the company, shall remain to a certain extent liable; but, then, the extent of that liability can only be measured with reference to the general

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enactment that the existing members of the company (that is, the members of the company *minus* the retiring and transferring partners) shall be first resorted to for the payment of the debts. I apprehend there is no difficulty about the matter, if you will only take the 3rd sub-section of the 38th section, and apply it first, before you come to the second sub-section, which is not happily worded, and which ought to be read as an affirmative proposition, instead of being expressed, as it is now, in negative words.

The 3rd sub-section directs that the existing members shall be first exhausted. Now, exhausted for the benefit of whom? Exhausted for the benefit of all the existing creditors of the partnership. Now, all the existing creditors are creditors whose debts remain unsatisfied, no matter at what time they were contracted. The existing creditors, therefore, who are thus to be regarded with reference to the liability of the existing partners, will be those creditors who remain unpaid, whatever may be the date of their debts, whether they are debts contracted within the last year, or whether they are debts contracted many years ago. The consequences of that direction must be attended to, and they appear to me to remove all possible difficulty. The direction is this:—You will apply all that you can get from the existing members in payment of the existing debts, no matter of what date. If, after you have done that, there remain debts unsatisfied, so that you have to resort to the members who have passed away from the company within a year, then you will be compelled to classify the residuum of the debts so remaining, and ascertain what part of that residuum is to be attributed to past debts; that is, to debts which pre-existed the transfer made by past members, and what portion is to be attributed to the new debts which have arisen subsequently to the date of the last transfer. When you have ascertained the proportion which is attributable to debts which existed when the transfers were made,—then, if there have been several transfers within the year, you will be compelled of necessity to subdivide that portion of the residuum into several portions, according as you find that transfers have been made within the past year. It would be impossible to escape from that difficulty. It is not a difficulty, I think, which, in practice will be found to be of any

magnitude. It exists only in words, when you have, in an abstract form, to express the rule of distribution.

Now, my Lords, that renders the matter perfectly clear, and it is impossible to give to the older creditors any preferential claim, for this plain reason, that they have, with the new creditors, all been admitted to share and to take a portion of the contributions to the uttermost that were obtainable from the existing members. First of all there is a joint stock fund created out of the contributions of the existing members, and that is divided *pari passu* among all the creditors without regard at all to the date of their debts. The older creditors of the partnership having come in to participate in that fund, it is impossible for them afterwards to claim the benefit of any rule of distribution which would give them anything like a preferential right to a particular portion of the assets remaining still to be distributed.

The whole of this misapprehension and mistake appears to have arisen from the construction put by the Appellants upon the second sub-section, which says: "No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member." The Appellants have read that in this way—they say it provides that the fund that shall be created by the contributions of past members shall be limited only to the amount of the debt existing at the time when the transfer was made by them; and then they say that excludes all the new creditors, and if the fund is to be created with the exclusion of the new or subsequent creditors, of necessity that fund must belong to the older creditors who existed when the B shareholders left the company. But it is in reality only a limitation of the liability of the past members to contribute. The Act of Parliament has the effect of creating two limits of liability. The limit of the liability of the existing members will be the full extent of the shares held by those members in the partnership. The limit of the liability of the past members is the amount of the debts existing at the time of the transfer made by each, subject, of course, to this, that no past member shall be bound to contribute more than to the extent of the shares held by him and transferred by him. The effect of the Act, therefore, is to create two classes of contributories by a minor subdivision, namely, those who con-

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tribute to the full extent of the shares held by them, and who, under clause 3, must be first exhausted, and those who are bound to contribute to the extent of (for that is the effect of the words "in respect of") the debts or liabilities of the company existing at the time of the transfer. If you convert the negative proposition contained in the second sub-section into an affirmative proposition, which is the result of the whole of the enactments, although I think it might have been much more happily expressed, there is no difficulty at all in the working of the rule given by this 38th section.

But, as I said repeatedly during the argument, all that we have judicially to do now is to declare whether we can or cannot assent to the proposition of the Appellants. They applied to Vice-Chancellor *Stuart* that it might be declared that the contributions received from persons who were past members, should be divided, exclusively, amongst those creditors of the company only whose debts were contracted before the times of such past members ceasing to be members; that is to say, among creditors claiming, *proprio jure*, under the words of the Act, a right to have that portion of the common fund appropriated exclusively to the payment of their debts. Now, there is nothing in the language of the Act to give a *locus standi* to any creditors for the purpose of maintaining such a proposition. There is nothing in the Act which, either expressly or by any kind of implication, gives them that right. There is nothing either in the Act, or in the machinery for distribution which it creates, that would enure to give this class of creditors any such right. It would be impossible for this class of creditors, who have been compelled to come in and participate in the first fund, which is created by calls on the existing members, to insist, after they have had that participation, that still there shall be appropriated to them alone this second portion of the fund, and that they shall be entitled to claim payment of their own debts out of it to the exclusion of the other creditors.

The object of the Act of Parliament was to give a limit to the liability of members who had transferred their shares within a definite time, and that liability takes the place of the old liability, which would be a liability limited to the amount of their shares only. Therefore there are now two sets of contributories, one called Class A—that is, all the existing members the limit of

whose liability is the amount payable upon their shares—and another class, which is to be resorted to only in the event of the contributions of the existing members not being sufficient to answer all the purposes; and if they are resorted to, they are bound to contribute, but with a different limit of liability, namely, the amount required to satisfy the debts existing at the time when they retired from the partnership.

Under these circumstances, my Lords, I think the appeal has been founded altogether upon a groundless misinterpretation of the Act of Parliament, and that the appeal, therefore, must be dismissed with costs.

LORD COLONSAY:—

My Lords, I am of opinion that the contention of the Appellants here, the B creditors, is not supported by the provisions of the Act of 1862, whether read by itself or read in the light of the previous enactments regarding joint stock companies; and in particular I am of opinion that the 38th section, upon which the argument was mainly founded, is a section which is intended to regulate the measure of liability of those members of the company who have retired within a year. The difficulty which arises upon that section seems to me to centre in the words of the 2nd sub-section. Those words are not happily expressed, but I think they are not words from which the Appellants can deduce the inference which they seek to deduce from them; for I think that that sub-section, like the other portions of sect. 38, is intended to give one of the measures of the liability of the members who have retired. There is a difficulty in understanding it, for it is not very accurately expressed; but I think it gives no support to the contention of the Appellants. I am far from saying that there may not arise under it practical difficulties in regard to the sums obtained from the several members who have retired at different periods, in measuring the amount of the debts due at the periods when each of them retired. That is a practical difficulty, but it is altogether away from the question we are now considering, which is, whether the B creditors constitute a preferential set of creditors, entitled to take to themselves the money derived from the B members of the company. I am of opinion that the

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judgment appealed from ought to be affirmed, and that the appeal should be dismissed with costs.

LORD CAIRNS:—

My Lords, it is peculiarly necessary in this case to bear in mind what is the precise point which is brought before your Lordships for decision. The Appellants state it in this way. They seek that the liquidators of the company may be directed to divide the contributions received from persons settled on the B list of contributories among those of the unpaid creditors of the company only, whose debts were contracted before the respective times of such contributories ceasing to be members of the corporation. Your Lordships, therefore, observe at once, that there is no controversy as to the settlement of the list which is called the A list of contributories, namely, the existing members of the company. There is no controversy as to the settlement of the list which is called the B list, namely, the ex-members of the company. There is no controversy as to the inability of the contributories on the A list to satisfy the demands which were justly made upon them, and there is no controversy that the call which has been made upon the ex-members on the B list has been the proper amount or *quantum* of call. These matters are all removed out of the range of controversy or dispute.

The only question which your Lordships have to determine is, what is to be done with the money which has been levied as contribution from the ex-members on the B list? Is that money to go into the common fund of the company, or is it to be segregated and set apart for the purpose of paying the particular class or classes of creditors who existed as creditors at the time or times of the retirement of the ex-members?

Now, my Lords, in approaching the consideration of that question, the first observation which naturally occurs upon the contest of the Appellants is this: If they are entitled to the advantage which they desire, namely, to have these contributions from the B list applied in payment of their debts in particular, that advantage has arisen from a simple accident; the accident, namely, that the contributories upon the A list have been unable to satisfy the whole of the contribution which was required of them. The advantage

has not arisen by contract, or by stipulation of any kind. If the contributories on the A list had been able to satisfy the full amount of the contribution which was required of them, it is not denied by the Appellants that those contributions must have been divided rateably among all the creditors of the company, old and new, without any distinction whatever.

The second observation, which occurs at the outset, as proper to be made upon the contest of the Appellants, is this: It is not in dispute but that the Appellants are entitled to receive, and possibly have received, a rateable dividend along with all other creditors out of the fund which has been contributed by the members upon the A list. What they ask for, therefore, is something over and above that dividend which they and all the other creditors have received; they ask to have that other and greater dividend in preference to all whom I may term the modern creditors of the company. They, therefore, contend that the effect of the liquidation, the effect of the circumstance that the company is now being wound up, is such that it has given to the Appellants a preferential debt, whereas before the winding-up most clearly their debt was in no sense a preferential debt against the company. Before the winding-up the Appellants could not have affirmed of their debt that they had taken any particular security for it, or that they had contracted that, as between various portions of the capital of the company, their debt should stand in a better position than any other debt. So long as the company was going on up to the time of the winding-up order, beyond all doubt the debts would have been paid *pari passu*, and no creditor would have been able to affirm that he was in a better position than another creditor.

Your Lordships are quite familiar with the fact, that in many cases where you have to administer assets upon an insolvency, or upon a liquidation, claims which before the administration of the assets were preferential are cut down and deprived of their preferential quality or attribute. But I own that it is entirely new to me to hear an argument that the effect of liquidation, which is ordinarily to cut down preferential claims, is to make a claim, which before liquidation was not preferential, emerge into a preferential claim, and assume a quality which it never possessed before. This is a result of the argument of the Appellants, which is so startling

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that it would induce your Lordships, I think, to pause, before that argument could be admitted.

It appears to me that the argument of the Appellants, which was urged with great ability and force, is founded altogether upon a fallacy, the statement of which removes every difficulty out of the case. The Appellants proceed upon the assumption that they are entitled to establish a direct relation of creditor and debtor between themselves and certain members of the company. Now, I understand the whole scheme of the Act of 1862 to be entirely at variance with any theory of that kind. As I understand that Act, the relation of creditor and debtor which is established by the Act is established only with regard to that which is the common fund or capital of the company. It was always the habit in ordinary partnerships, and it was the habit in previous Acts, or in almost all previous Acts of Parliament, to constitute more or less of a direct relation between the creditor and the debtor, between the creditor and the particular individual shareholder in the company. In some of the former Joint Stock Companies Acts, even although the process had to be taken in the first instance against the company, the creditor was afterwards allowed to take out execution under certain qualifications against an individual shareholder, and in that way, to constitute a direct relation between himself and the individual shareholder. But by the Act of 1862 that state of things is entirely swept away. A capital is created, sometimes limited, sometimes without a limit; but that capital is to be made good in the shape of a common fund, and that common fund it is which is to be the source of the payment of every creditor of the company. And although it is quite true that members and ex-members of the company are placed by the Act under liability, that liability is a liability, not to make payments to creditors, but it is a liability to contribute to and make good what should be the proper amount of the common fund. Then, having got into the common fund every sum which ought to be contributed to it by every person whomsoever, the Legislature takes possession of that common fund, and proceeds to distribute it amongst the creditors of the company.

My Lords, this would be made very clear, I think, by merely reading the 133rd section of the Act of Parliament. It is quite

true, as has been observed, that that 133rd section applies to the case of a voluntary winding-up only; but your Lordships will observe, in looking at this Act of Parliament, that it has been thought, and very naturally thought, important in the case of voluntary windings-up to make specific provisions, and to give specific directions as to matters which were supposed to be so plain, and so necessarily consequential upon the general scheme of the Act, that in a winding-up under the order of the Court it was not thought necessary to give express directions upon these matters of detail. An illustration of that might be found in the way in which the provision to be made for costs is dealt with by the same Act of Parliament. In the case of a voluntary winding-up there is an express direction that the costs shall be paid, in the first instance, out of the moneys contributed, that is out of the common fund. In the case of a winding-up under the order of the Court there is no such provision, it being, I suppose, presumed that the Court would see that the justice of the case required that, in the first instance, the costs of winding-up ought to be paid. So, also, with regard to the distribution of the assets, we have this direction given to the liquidators under a voluntary winding-up, who were not, therefore, acting directly and constantly under the orders of Court (and the company now before your Lordships is a company under voluntary liquidation): "The following consequences shall ensue upon the voluntary winding-up of a company: The property of the company shall be applied in satisfaction of its liabilities *pari passu*."

Now, I ask the question, are the contributions to be made by the ex-members the property of the company or are they not? Can it be contended for a moment that they are not? Whose property are they, if they are not the property of the company? Is there anything in this Act of Parliament which makes them the property of any other person but the company? It appears to me, my Lords, beyond all doubt, that all unpaid calls, whether from members or from ex-members, are part of the property and the assets of the company; and I certainly cannot read this section as we were told it had been read, as meaning by "the property of the company" the property in specie in the office, or the warehouses, or the stores of the company, at the time of the winding-up, as

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distinguished from the credits of the company, or the funds coming to the company in respect of unpaid capital. The 133rd section, therefore, my Lords, entirely supports the general theory which I have ventured to submit to your Lordships as the theory upon which the Act of Parliament is framed.

But, then, we were told that the argument of the Appellants was to be supported upon the 38th section of the Act. Now it is necessary to observe that the 38th section consists of two parts. The first part is the affirmative part of the section, which lays down the general principle, that contributions shall come, so far as is necessary, both from members and from ex-members of the company. And it is worth while observing, although it is by no means an observation which is conclusive of the argument, that this 38th section is headed as a separate division of the Act by the words, "Liability of Members," as if its entire object was to define the amount of liability of members; whereas the *fasciculus* of clauses which commence with the following section, the 39th, is headed in a manner altogether different, namely, "Provisions for Protection of Creditors." It is under these provisions that you would expect to find arrangements made for the special protection of creditors, and not under the 38th section.

Now, the 38th section, applying itself to the liability of members of companies, says: "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following." Now the observations which naturally arise in one's mind upon that part of the section are these: In the first place, the contribution here spoken of, which is to be a contribution not merely by present, but by ex-members, is to be a contribution not to particular creditors, but to the assets of the company. The second observation is this, that the contribution is not to be merely a contribution for payment of debts and liabilities, but it is also to be a contribution for payment of the costs, charges, and expenses of the winding-up. And the third

observation is this: that all the subsidiary enactments which occur in the latter part of the clause are here described as "qualifications," namely, qualifications upon the general liability which is here established, that is to say, some enactments which are to be in diminution or restriction of that general liability, and not enactments for the purpose of creating new and separate rights in creditors.

My Lords, I do not dwell upon these qualifications, the meaning of which is perfectly obvious. There is a period of a year, during which alone an ex-member is to be liable. There is a protection to ex-members in this, that it must be first ascertained that the existing members are unable to satisfy the contributions required to be made by them. I only observe upon that, that it is not that you are to wait until the assets raised from the existing members are exhausted, but you are entitled to act the moment it appears to the Court that the existing members are unable to satisfy the contributions required of them. There is also the qualification that in a limited liability company there is no contribution to be required either from a present member or an ex-member exceeding the amount of capital unpaid upon his share. Upon these qualifications no question can arise.

The second qualification, which is supposed to have created the difficulty, is this: "No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member." Now, there I ask the question, contribute to what? For upon the answer to that question it appears to me the solution of the whole difficulty depends. Does it mean contribute to the payment of a particular creditor, or a particular class of creditors? Surely not. "Contribute" there is used without the words that follow it in the general enactment at the commencement of the section, namely, to contribute to the assets of the company. Therefore I read the second sub-division of the section as if it stood thus: No past member shall be liable to contribute to the assets of the company in respect of any debt or liability of the company contracted after the time at which he ceased to be a member. Then I find the whole section is harmonious. There are series of limitations upon liability. The liability is a liability to contribute to the assets or the common

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fund of the company. To that fund the contributions must be made. The contribution is to be governed by these qualifications. No new destination is given to the money to be contributed, but that money is to be applied under the 133rd section *pari passu* amongst all the creditors of the company.

Now, we were pressed very much with this question: but how is the official manager to adjust and define the sum he is to call for from the ex-members of the company? My Lords, I think it is important that it should be borne in mind that any opinion that your Lordships, or any of your Lordships, might express upon this subject, cannot upon this appeal become the order of the House, and cannot, therefore, have the effect of a decision of that question; and in many respects I should have desired not to express even a passing opinion upon the subject, because if it should ever hereafter come in controversy, and be brought before your Lordships, I desire that it should come perfectly unaffected as regards any decision of this House by any extra-judicial expression of opinion which may now take place. I own that, as at present advised (but I repeat that it is entirely open to a reconsideration of the question), I see little or no difficulty in the matter. It appears to me that where the official liquidator, acting under the Court, has ascertained that the existing members are unable to satisfy the contributions required of them, he has then to make a call upon the ex-members, but in making that call he must observe and pay attention to the debts which were in existence at the time each particular ex-member ceased to be a member, and he must disregard the debts which were incurred after that time. Of course the debts to which he must have regard would be old debts continuing to be debts up to the time and at the time of the winding-up.

It was said that this view of the Act of Parliament would be at variance with two decisions of the Court of Chancery, the decision in *Brett's Case* (1), and the decision in *Morris's Case* (2). Now *Brett's Case* was a case of great peculiarity. The circumstances in it probably had never occurred before, and possibly may never occur again. I should be unwilling to express any opinion as to whether, having regard to the peculiarity of those circumstances, that decision could or could not be made to agree with the view which

(1) Law Rep. 6 Ch. Ap. 800.

(2) Law Rep. 7 Ch. Ap. 206.

I understand the majority or all of your Lordships to entertain on the present appeal. I will only say this about it. It appears to me that there were two points which did not receive, either in the argument, or in the judgment in *Brett's Case* (1), the consideration to which I think they were entitled. One of those points was the liability of ex-members to provide for the costs of the winding-up, whether they were past debts, old debts, in respect of which they were liable, or not. The other matter to which I think sufficient attention was not paid was the question whether the debts in respect of which contributions could be called for from ex-members are not what I have called "old debts," subsisting at the date of the winding-up, and whether anything done with regard to those debts after the date of the winding-up could affect or diminish the liability which had once accrued upon the ex-members.

My Lords, with regard to *Morris's Case* (2), I own I think the determination of that case cannot subsist with the determination at which your Lordships seem now likely to arrive on the present appeal, and I myself think that the decision in *Morris's Case* proceeded upon a construction of this Act of Parliament which I am unable to accept.

I therefore concur with your Lordships in thinking that this appeal should be dismissed. In a case of considerable difficulty there might be, under other circumstances, some ground for submitting to your Lordships that the general rule of dismissing an appeal with costs should not apply; but I own that I think that in the present case these Appellants have had at least as much favour shewn to them in the matter of costs as they are entitled to, because I find that the decision of the Vice-Chancellor was against them, and the decision of Lord Justice *Giffard* was against them, and yet in both of those Courts their costs were paid out of the assets of the company. They then obtained, after the time for appealing had elapsed, a special leave to appeal, and they appear also to have obtained an order restraining the payment of any farther dividends to the creditors of the company (although a farther dividend had been declared, and was ready to be paid) until the result of this appeal should be ascertained. They have, therefore, I should think, been the cause of very considerable

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(1) Law Rep. 6 Ch. Ap. 800.

(2) Law Rep. 7 Ch. Ap. 200.

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inconvenience and expense in the liquidation of this company, and I think, having had upon two occasions decisions against them, and yet having had on each occasion their costs allowed them out of the assets of the company, there is no course now open to your Lordships but to dismiss this appeal with costs.

*Order appealed from affirmed, and appeal dismissed
with costs.*

Lords' Journal, 30th July, 1872.

Solicitors for Appellant : *Deane, Chubb & Co.*

Solicitors for Respondent : *Lewis, Munns & Longden.*

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"A" AND "B" LISTS: See COMPANIES; LIQUIDATORS; WINDING-UP.

AFFIDAVIT: See CALLS.

AGREEMENT.] If the person who receives a letter containing the terms of a proposed agreement writes an answer reciting those terms, and declaring his acceptance of them, he cannot, in any way, vary the effect of them without distinctly calling the attention of the party making the offer to the fact of his desire to do so.—The mere addition of words which, *prima facie*, do not import a variation will not be sufficient to charge the conditions of the agreement.—*A.* wrote to *B.* saying: "I have been requested to grant a credit in favour of *C.*, and I consent to do so, and authorize you to draw upon me for *C.*'s account, for the sum of £15,000 in drafts at three months' date which I engage to have renewed three times by drafts of the same date, *making the currency of the credit twelve months in all*, provided you give me an undertaking to furnish me with funds to *pay each set of bills previous to maturity*, in order to keep me out of cash advance." *B.* answered, copying and adopting this letter, but after the last word, "advance," adding "*for the said twelve months.*" In the next part of *B.*'s letter was this sentence: "We take note of the said credit, and subscribe to the engagement of *renewing three times our drafts*, with furnishing you with the funds to pay the drafts renewed, in order to keep you out of cash advance *for twelve months.*" Bills were drawn and renewed under this agreement. The last renewals became due a few days after the expiration of twelve months from the date of *B.*'s letter:—*Held*, that the agreement was, in substance, to "pay each set of bills previous to maturity," and that *B.* had not satisfied it by keeping *A.* out of cash advance for the first bills and the first and second renewals, but was bound to keep *A.* out of cash advance for the last-renewed bills. ENGLISH AND FOREIGN CREDIT COMPANY v. ARDUIN - 64

APPEAL, TIME FOR: See COMPANIES ACT; ERROR.

ARBITRATION.] An arbitrator may be called as a witness in a legal proceeding to enforce his award.—He may be asked questions as to what passed before him, and as to what matters were presented to him for consideration.—But no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matters submitted to him.—*B.* was the owner of a mansion on the banks of the

ARBITRATION—continued.

Thames, with a large garden frontage thereon—the river was embanked under the authority of an Act of Parliament—a large strip of dry land was formed where the river had formerly flowed up to the garden, and a public road was made between this strip of land and the river. *B.* claimed compensation under the Act. The claim was referred to arbitration:—*Held*, that the loss of the use of the river frontage and the consequent loss of privacy, and the increase of dust and noise by the creation of the embankment and road, were subjects for the arbitrators to consider, as occasioning deterioration in the selling value of the property, for which he was to determine the amount of compensation. Its amount was entirely in his discretion, and his award could not be impeached on the ground that he must have considered all these subjects in making up his mind as to the extent of the money deterioration of the property and the amount of the compensation therefore to be given. DUKE OF BUCCLEUCH v. METROPOLITAN BOARD OF WORKS - 418

"ASSETS": See COMPANY.

ASSIGNMENT.] A notice to the vendor of an estate that the vendee has deposited the contract with a third party, *A.*, and has entered into an agreement with *A.* to make to *A.* "a valid assignment" of the contract, does not bind the vendor to make inquiries whether the agreement between the vendee and *A.* has been carried into effect; nor will it compel the vendor to refuse to execute the conveyance to the vendee, who, upon the payment of the purchase-money, demands the conveyance, nor even excuse the vendor for making such a refusal.—The persons who claim to have the benefit of the assignment must give distinct notice to the vendor of their claim, and of their readiness to put themselves in the vendor's position for the completion of the contract.—*F.* entered into a contract with *P.* to sell him some leasehold property. *P.* paid part of the purchase-money, and obtained from *F.* a lease of the premises for a short term of years, in favour of a nominee of *P.* *P.* had dealings with bankers, to whom he became much indebted. Being called on to give the bankers some security, he handed to them the title deeds of a freehold estate, which he charged with the debt, and at the same time he deposited with them his contract for the purchase of the leasehold property. He accompanied this deposit with a written memorandum,

ASSIGNMENT—continued.

in which he agreed to make to the bankers "a valid assignment of my contract with F. for the purchase of" the leasehold premises, "by way of mortgage for farther securing," &c. The bankers, by their solicitors, some time afterwards gave to F. notice (in the above words) of this agreement, and the solicitor's letter called it "a charge by P. on his purchase." F. acknowledged the receipt of this notice. He heard nothing more of the matter. P. did not complete his purchase at the stipulated time, but did so afterwards, and then F., according to the terms of the original contract, executed to him a conveyance of the leasehold premises, without any notice being taken in the conveyance of the claims of the bankers:—*Held*, that the rule of Equity, that a vendor of an estate is, after the making of the contract of sale, a trustee for the purchaser, did not apply to this case, and that F. was in no way liable to the bankers. *SHAW v. FOSTER* - - - 321

BANKERS.] The 33 Geo. 2, c. 14 (*Ir.*) does not relate exclusively to persons who carry on the business of banking in the way of banks of issue, but to all bankers whatever.—The 33 Geo. 2, c. 14 (*Ir.*), is unrepealed except as to such specific matters contained in it as have been the subject of special legislation.—A memorandum accompanying a deposit of deeds made as security for a debt, and made by a person carrying on the ordinary business of a Banker, is therefore within the provisions of the 33 Geo. 2, c. 14 (*Ir.*), and ought, according to their requirements, to be registered, in order to be valid as against creditors under a trust deed executed pursuant to the provisions of that Act.—The memorandum might have been registered, and ought to have been registered, even though the stoppage of payment by the Banker took place within one month after its date.—A trust deed so executed will be valid for all purposes affecting the distribution of the estate among the creditors, though it should be followed by a general bankruptcy.—The 10th section of the statute, which relates to the approval of a trust deed by the majority of the creditors, is merely directory. *COPLAND v. DAVIES*

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BANKRUPTCY: See BANKERS; WINDING-UP.

Where a deed of composition with creditors has been executed, under the terms of which certain persons, constituted trustees under the deed, are in possession of the promissory notes given to satisfy the amount agreed on as the composition, such trustees are, as between the parties to the deed, stakeholders, and are not the servants either of the persons who gave the notes, or of the persons who, under the provisions of the deed, would be entitled to receive them.—If, therefore, the person who made the notes, and handed them over to the trustees to deal with them under the deed, should afterwards give notice to the trustees not to hand them over to a particular creditor, the creditor cannot maintain *detinue* against such person, the notes not being in his possession either really or constructively.—*W. A. W.* was in difficulties. A composition with his creditors was proposed, and was agreed to by them. By the deed of composition *W. A. W.* and his father were to give promissory notes for

BANKRUPTCY—continued.

the composition. *L.*, a creditor, signed the deed, but on the next day wrote (through his attorneys) to say that he had discovered the balance-sheet presented to the creditors to be incorrect, and he withdrew his assent to the deed. The deed was duly registered under the *Bankruptcy Act* of 1861, and the promissory notes made, but *L.* refused to receive them. He afterwards brought an action against *W. A. W.* for the original debt, to which the deed was pleaded as an answer. *L.* replied that it had been obtained by fraud. The cause was referred to arbitration, and after it had been referred *W. A. W.* withdrew from the reference, and the award was made in favour of *L.* Nothing was done on the award, but some time afterwards *L.* demanded from the trustees the notes which had been made for his share of the composition. The trustee (acting upon a notice received from the father) refused to deliver up the notes. *L.* thereon brought *detinue* against the father. This action was also referred, and on a case setting forth these facts (but which did not reserve to the Court liberty to draw inferences), the Court of Queen's Bench gave judgment for *L.* The judgment was reversed in the Exchequer Chamber. On appeal to this house:—*Held*, that the action was not maintainable; that whether the deed was invalid or not could not on this case be determined by the House; that the Plaintiff's proper remedy was by application to the Court of Bankruptcy, which had power to do complete justice between the parties; and this House, therefore, while affirming, with costs, the judgment of the Court below, expressly reserved to the Plaintiff the liberty to apply to the Court of Bankruptcy. *LATTER v. WHITE* - - - 578

BILL OF LADING: See MISDIRECTION.

In taking a bill of lading, the vendor of the goods who ships them controls the possession of the captain, and makes him accountable to deliver the cargo according to its terms. It is the symbol of property, and the holder of it retains the property in himself. It is not inconsistent with a statement in the invoice that the goods are "shipped on account and at the risk" of the consignee. The *jus disponendi* is still reserved to the shipper through the medium of the bill of lading.—The burden of shewing the existence of a different state of things lies on the person who contradicts what would be the ordinary legal conclusion from the transaction.—Where a bill of lading, and a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to a vendee of the goods, it is a well understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained.—Where the bill of exchange is not accepted, but the bill of lading is retained, the bill of lading, acquired in that manner, gives no right of property to the person so acquiring it.—*S.*, who was in good credit with *P. & N.*, at *Brazil*, desired them to purchase cotton for him. Their agent in *England* was *G. P.* They did purchase the cotton, and sent it, the invoice describing it as shipped on account and at the risk of *S.* The invoice and two bills of lading were enclosed in a letter to *G. P.*, who forwarded the invoice and one of the bills of lading, together with a bill of

BILL OF LADING—*continued.*

exchange for the price of the cotton, to *S.*, in a letter, in which they said: "We enclose bill of lading, &c., shipped by *P. & N.* on your account. We hand also the draft on your good selves for costs of the cotton, to which we beg your protection." *S.* wrote an answer, making some complaints about the quality and price of the cotton, and after referring to some previous transaction, said that these circumstances stood in the way of his accepting the bill. He handed over the bill of lading to his brokers, who paid the freight, and obtained from the shipowners a delivery order; but before the cotton was actually delivered to the brokers of *S.*, *G. P.* interposed, and on the authority of the duplicate bill of lading obtained delivery of the cotton:—*Held*, that the property in the cotton had not, under these circumstances, passed to *S.*, but remained with *P. & N.*, whose agent was lawfully justified in taking possession of the cotton. *SHEPHERD v. HARRISON* - 116

BILLS AND NOTES: See AGREEMENT; BANKERS; BANKRUPTCY; BILL OF EXCHANGE; BILL OF LADING; WINDING-UP.

CALLS: See COMPANY.

The affidavits to satisfy the Court that a call ought to be made, need not enter into minute details to shew why the liquidators declare themselves only able to realise a certain sum, but must state reasonable grounds for that opinion of the liquidators.—Past members who deem the statements of liquidators on a winding-up to be insufficient to justify calls being made on them, must not wait till after a decision has been pronounced on those statements, and has been made the subject of appeal, but must at the time of those statements have made submit them to the process of a cross-examination. *HELBERT v. BANNER* 28

CAUSEWAY: See COMPENSATION.

CERTIFICATE UNDER RAILWAY ACT: See RAILWAY. 2.

CHANCERY: See RAILWAY. 2.

CHATELS: See WILL.

COAL MINE: See IRON MINES,

COMBINATION, NEW, OF OLD THINGS: See PATENT.

COMMISSION AGENT: See CONTRACT; PRINCIPAL AND AGENT.

COMMISSION MERCHANTS: See CONTRACT.

— Their duty examined. *IRELAND v. LIVINGSTON* - - - - 395

COMMON: See LEASE; TENANTS IN COMMON.

COMPANY AND COMPANIES ACT: See DIRECTORS.

1. By the 38th section of the *Companies Act*, 1862, all "past members" of a company which is being wound up are liable to contribute to the debts and liabilities of the company, subject to the conditions imposed by three sub-sections of that section: first, that the person has only ceased to be a member within the year; next, that the debts must have been contracted before he ceased to be a member; and third, that the "present members" are unable to satisfy the contributions required to discharge the debts of the company.—Making a call is within the discretion of the Court; and the call will not be

COMPANY AND COMPANIES ACT—*continued.*

made if the Court is satisfied that there are sufficient assets in the hands of the liquidators; but it will be made if there are only outstanding assets the realization of which is doubtful both as to amount and time.—The statute having taken away from the creditors of a company the right to a remedy by the ordinary process of action, the Court will not favour delay in providing the means of satisfying their claims under a winding-up.—The affidavits to satisfy the Court that a call ought to be made, need not enter into minute details to shew why the liquidators declare themselves only able to realize a certain sum, but must state reasonable grounds for that opinion of the liquidators.—Past members who deem the statements of liquidators on a winding-up to be insufficient to justify calls being made on them, must not wait till after a decision has been pronounced on those statements, and has been made the subject of appeal, but must at the time of those statements being made submit them to the process of a cross-examination. Compromises with some of the existing members of a company under a winding-up, effected by the liquidators with the sanction of the Court, cannot operate as a release to the past members. The two classes of persons do not stand to each other in the relation of principal and surety. *HELBERT v. BANNER* - - - - 28

2. — The power given by the 124th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), to a Court of Appeal to extend the time for appealing may be exercised after the time given by that statute for giving notice of appeal has expired. *BANNER v. JOHNSTON* - - - - 157

3. — Where the requisite number of persons and the requisite forms of application are presented to the Registrar of Joint Stock Companies under the provisions of the *Companies Act*, 1862, though the persons applying for registration of a company may be foreigners, and though there may be many circumstances tending to shew that the company sought to be registered is, in several respects, a foreign company, he is not bound to refuse it registration.—If there are in it shares in conformity with the statute, though there may be others of a different kind, and though the principal business seems likely to be transacted abroad, he may still grant it registration.—A company having many of its shares transferable by delivery, but having also many "nominative shares," *i. e.*, shares which are the same as the ordinary joint stock shares in companies in this country, applied for registration. The seven shareholders who made the application were all resident abroad, and the first directors nominated were foreigners, and only one of them appeared to have even a temporary residence in *England*. The articles of association referred in several places to the *English Law*, and especially to the *Companies Act*, 1862. There was an office of the company in *Westminster*, but it was doubtful whether any general meeting was intended to be held in *London*, or other place in *England*. The Registrar granted it registration:—*Held*, that he was lawfully entitled to do so, that he was not bound to refuse the registration, and that, the registration having been thus actually made, the usual legal conse-

COMPANY AND COMPANIES ACT—continued.

quences of registration arose:—*Held*, therefore, that if the circumstances occurred which, by the *Companies Act*, 1862, s. 79, were such as, in the opinion of the Court, made it “just and equitable” that the company should be wound up, the Court might lawfully and properly issue the order for winding it up. *PRINCESS OF REUSS v. BOS* 176

4. — *W.* was an official in *Scotland* of an English company; the company desired to have a board of directors there. *W.* suggested to *D.*, who lived in *Scotland*, to take shares and become one of the intended directors. *D.* objected on the ground that it was not a company of limited liability; *W.* assured him that he should be secured against loss, and that a bill was then about to be presented to Parliament to limit the shareholders' liability. *D.* thereon consented, and *W.* applied in his name for ten shares, obtained an allotment of ten, and paid the deposit on them. This deposit was never repaid by *D.* to *W.* *D.*, at *W.*'s request, signed a proxy paper, and also a receipt for a dividend, which, however, was in fact paid to *W.* The bill in Parliament was not passed. Some time afterwards a call was made on *D.* in respect of his shares, of which he took no notice; another call was made; he denied his liability, and desired *W.* to state the facts to the directors, and to claim his discharge from liability. *W.* did so; and the directors, who, by the resolution of a general meeting, possessed powers to make compromises in disputes with shareholders (though not, in terms, to cancel shares), consented that, on *D.*'s paying a certain call then due, his shares should be cancelled. The money was paid, and *D.*'s name was struck out of the list, and a balance sheet with his name struck out was presented at a general meeting as containing a list of persons whose shares had been cancelled. So things remained till some years afterwards, when the company was ordered to be wound up; and *D.*'s name was put upon the list of contributories:—*Held*, that it must be removed therefrom; that the directors had had the power to make a compromise of a disputed claim, that this case came within the power, and that the power had been *bonâ fide* and rightly exercised. *DIXON v. EVANS* [606

5. — In a winding-up, the funds contributed by the B list of shareholders become part of the general assets of the company, and are not to be applied, preferentially or exclusively, to the payment of those debts which were incurred before the B shareholders retired from the company.—The 38th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), makes the “past members” (persons who have become so by retiring from the company within a year before the date of the winding-up order), liable to contribute to the assets of the company for the payment of the debts and liabilities of the company, but, though they are not specifically liable to satisfy debts which have been contracted since they left the company, yet, when they have become liable to contribute to the assets of the company, and have so contributed, their contributions become part of the general assets, and cannot be appropriated exclusively to the payment of those debts which had been incurred before these members retired

COMPANY AND COMPANIES ACT—continued.

from the company.—The word “assets” in the 38th section of this statute means the same as the word “property” in the 133rd section, and both alike mean all the unpaid capital recoverable, as well as the other property of the company.—Observations by Lord Cairns on the duty of the liquidators in making calls on the past members of a company. *WEBB v. WHIFFIN* - - 711

COMPENSATION: See LEASE; RAILWAY.

Though compensation may not be granted to a person annoyed by the smoke and vibration occasioned by trains passing along a railway, constructed under the authority of an Act of Parliament, where no part of his land has been taken, compensation may be given for deterioration in the value of his property occasioned in a similar manner, where a part of his land has been taken for the construction of a work authorized by an Act.—In this question of compensation may be considered his particular and individual use of that in which he has no proprietary right, such as the shore of a tidal river.—*B.* was the owner of a garden on the bank of the *Thames*; he had had (like his predecessors in the occupation of the same garden) the use of a causeway which ran from his garden to low-water mark in the river—and which was always repaired and kept in order by him—he was deprived of the use of this causeway and of his communication with the river by the embankment of the river, and the formation of a road between it and his garden:—*Per Lord Chelmsford*:—Whether the soil of the causeway, or only an easement over it, was in him, he was entitled under the 4th section of the *Thames Embankment Act* to compensation for the loss of its use.—*Per Lord Cairns*:—He was a riparian proprietor, having a right to the undisturbed flow of the river along the whole frontage of his property, and was entitled to damages for being deprived of this right.—*B.* was the owner of a mansion on the banks of the *Thames*, with a large garden frontage thereon—the river was embanked under the authority of an Act of Parliament (25 & 26 Vict. c. 93)—a large strip of dry land was formed where the river had formerly flowed up to the garden, and a public road was made between this strip of land and the river. *B.* claimed compensation under the Act. The claim was referred to arbitration:—*Held*, that the loss of the use of the river frontage and the consequent loss of privacy, and the increase of dust and noise by the creation of the embankment and road, were subjects for the arbitrators to consider, as occasioning deterioration in the selling value of the property, for which he was to determine the amount of compensation. *DUKE OF BUCKLEUCH v. METROPOLITAN BOARD OF WORKS* 418

COMPOSITION DEED: See BANKRUPTCY.**COMPROMISE: See COMPANY; DIRECTORS; LIQUIDATORS.**

1. Compromises with some of the existing members of a company under a winding-up, effected by the liquidators with the sanction of the Court, cannot operate as a release to the past members. The two classes of persons do not stand to each other in the relation of principal and surety. *HELBERT v. BANNER* - - - 28

COMPROMISE—continued.

2. — Supposing it to be within the power of each of two parties to make a compromise, all that a Court of Justice has to do with respect to it, is to ascertain that it has been *bonâ fide* made.—If so made, then, unless manifestly *ultrâ vires* of the parties, a Court of Justice ought to respect it, and not allow it to be questioned. *DIXON v. EVANS* 606
 “**COMPRISED.**” *KNOX v. GYE* - - - 656

COMPULSORY POWERS. *A.* was the owner of land required by a railway company; notice of an intention to take his land under the compulsory powers of its Act (private and local, into which the *Lands Clauses Act*, 1845 (8 & 9 Vict. c. 18), and the *Railways Act* (Ir.), 1851 (14 & 15 Vict. c. 70), were to be taken as incorporated) was given. The valuer under the *Railways Act* (Ir.), 1851, was appointed, and made his final award, which was not however delivered till a few days after the compulsory power to take the land under the local Act had expired. Abstracts of title, &c., were afterwards demanded by and supplied to the company, which, however, never entered into possession of the land. Before the time for the construction of the railway had expired, the landowner formally demanded the company's certificate of the amount awarded. This was never given. He then presented to the Court of Chancery in *Ireland* a petition praying that the company might be ordered to lodge the amount in the *Bank of Ireland*.—*Held*, that under the 21st section of the Act of 1851 the Court had power to grant this petition. *CORK AND YOUGHALL RAILWAY COMPANY v. HARNETT* - - - 111

CONTRACT : See AGREEMENT ; ASSIGNMENT.

1. Where a letter of orders which constitutes a contract from a merchant to his commission agent is so worded as to be capable of two interpretations, if the agent fairly and honestly assumes it to bear one of those interpretations, and acts on that assumption, the merchant cannot be released from his contract on the ground that he intended it to bear the other. As the error arose from his own indistinctness of expression, he must bear the loss.—*L.* wrote to *I. & Co.*, at *Mauritius*, desiring them to ship him 500 tons of sugar at 26/9, to cover freight and insurance: adding, “Fifty tons more or less of no moment, if it enables you to get a suitable vessel. I should prefer the option of sending vessel to *London*, *Liverpool*, or the *Clyde*; but if that is not compassable, you may ship to either *Liverpool* or *London*.” *I. & Co.* could only procure, at the price mentioned, nearly 400 tons, which they purchased from several different persons, and shipped in one vessel to *Liverpool*. *L.* refused the cargo, and wrote to cancel the order so as to prevent any farther shipment.—*Held*, that under the circumstances *L.* was bound to accept the cargo.—In the *Mauritius* market it is often impossible to obtain so large a quantity of sugar as 500 tons from one house, or to find one vessel to take it.—*Quære*, whether an order to commission merchants there to purchase such a cargo must be construed with reference to the customs of that market.—*Quære*, whether, in the circumstances above stated, the contract was to be regarded as a contract between principal and agent, or between vendor and vendee.—*Semble*, that the contract might be regarded in both aspects.—

CONTRACT—continued.

Kreuger v. Blanck (Law Rep. 5 Ex. 179) discussed.
 —(Duty of a commission agent explained by *Mr. Justice Blackburn*.) *IRELAND v. LIVINGSTON* 395

2. — *K.* advanced money to *G.* on the faith of a letter, which *K.* insisted constituted a contract of partnership in the profits of the business of the *Italian Opera* at *Covent Garden*. *G.* insisted that it amounted to nothing but an agreement to pay the amount of the loan and the interest on it out of the profits (if any should arise), but that the concern remained his alone. The letters which passed between the parties were held to bear this construction, and therefore an account, as of the profits of a partnership, was refused.—The advance was made with reference to the business of the *Italian Opera* at *Covent Garden*, the lease of which theatre was in the name of *G.* alone. That theatre was burnt down in 1856, and *G.* hired another theatre (the *Lyceum*), and carried on the business of the *Italian Opera* there, and in two years' time returned to a new theatre at *Covent Garden*, which had been built in the interval, and of which the lease, as in the former case, had been granted in his name alone. *KNOX v. GYE* - - - 656

CONVEYANCE : See ASSIGNMENT ; EXECUTORY COVENANT OR DEVISE.**CONTRIBUTORIES : See COMPANY ; COMPROMISE ; DIRECTORS ; WINDING-UP.**

CORPORATION. Though a corporation may have by statute a power to remove one of its officers holding a freehold office, the Court of Queen's Bench will see that that power is exercised in a lawful manner, and will interfere if it should not be so. But if exercised in a lawful manner that Court will refuse to interfere on the mere ground that the power has not been wisely or discreetly put in force in the particular case.—In the case of removal from office of an officer of the corporation, upon an accusation of inability or neglect of duty, if there has been such evidence given as in an ordinary trial would justify the Judge in leaving it to a jury to say, as a matter of fact, whether the accusation was made out, the Court will not interfere with the decision arrived at by the corporation.—A corporate body having the power to dismiss one of its officers, holding a freehold office, on complaint against him, referred to a committee of its own body the task of examining into the complaint, and receiving evidence upon it, and reporting thereon. The committee performed this duty. The report and evidence were duly furnished to the inculpated officer, who was then called on for his defence. He was afforded the opportunity of being heard, and counsel was heard for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office.—*Held*, that this was not a case of delegation of lawful authority, but was a due exercise of that authority by the corporate body itself.—*Per Lord Colonsay*.—The proceedings in this case were not to be assimilated to a criminal proceeding, but were to be treated in the nature of an official inquiry.—The 13 & 14 Vict. c. 61, gave to the Lord Chancellor the power to remove from office the Registrars of County Courts. The 15 & 16 Vict. c. lxxvii. (Local), declared the Mayor, Aldermen, and Commons, in Common Council assembled, entitled to appoint the Chief

CORPORATION—*continued.*

Clerk of the London (City) Small Debts Court, and "for inability or misbehaviour, or for any other cause which may appear reasonable to the Mayor and Council, to remove" the said Clerk. The 19 & 20 Vict. c. 108, directed previous County Court statutes to be read as part of that statute, and that the Chief Clerk of a County Court should thenceforward be called "the Registrar." The 28 & 29 Vict. c. 99 (regulating County Courts in general), directed that the Chief Clerk and the Chief Bailiff of the City Court should thenceforward be styled the Registrar and the High Bailiff, and that the City Court should have the same powers, &c., as a Metropolitan County Court; and it also incorporated with itself all the preceding public statutes relating to County Courts:—*Held*, that the specific enactment in the 15 & 16 Vict. c. lxxvii. (Local), as to the power of amotion from the office of Registrar to be exercised by the Mayor, &c., in Common Council assembled, was not taken away by the effect of the general statutes, but still existed in that body:—*Held*, also, that "reasonable" cause in the Act meant "just cause." *OSGOOD v. NELSON* - - - - - 636

COSTS: *See PRACTICE.*

1. A patent having been sustained, the decree granted an injunction against farther infringement, directed an inquiry as to damages, and an account of profits. The decree was varied by striking out the order for the account of profits.—But in this case the variation of the decree was *held* not to affect the patentee's right to costs. *NEILSON v. BETTS* - - - - - 1

2. — In like manner, where a Court has power to give costs, and it does not appear (apart from a suggestion of error in fact) that there was no certificate or order, the taxation by the Master cannot be impeached.—*Banks v. Newton* (11 Q. B. 340) overruled.—*Per Lord Chelmsford*:—Where the Defendant could, before judgment, have suggested the matter afterwards alleged as error, he cannot, by his subsequent suggestion of it, release himself from costs. *SCOTT v. BENNETT* - 234

3. — At the Rolls, where the case was first heard, *D.*'s name was ordered to be removed from the list of contributories. On appeal, the Lord Justice directed it to be replaced on the list. This House reversed the Lord Justice's order, restored that of the Master of the Rolls, and directed that the costs on the appeal in the Lord Justice's Court should be repaid to *D.* *DIXON v. EVANS* - - - - - 606

COUNTY COURT: *See CORPORATION.*

COVENANT: *See EXECUTORY COVENANT OR DEVISE; MARRIAGE ARTICLES.*

CREDIT, LETTERS OF: *See AGREEMENT.*

CUSTOM OF MARKET: *See MAURITIUS.*

DANGEROUS WORKS: *See RAILWAY* 1.

DECREE: *See PRACTICE.*

DELEGATION.] A corporate body having the power to dismiss one of its officers, holding a freehold office, on complaint against him, referred to a committee of its own body the task of examining into the complaint, and receiving evidence upon it, and reporting thereon. The committee performed this duty. The report and evidence

DELEGATION—*continued.*

were duly furnished to the inculpated officer, who was then called on for his defence. He was afforded the opportunity of being heard, and counsel was heard for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office:—*Held*, that this was not a case of delegation of lawful authority, but was a due exercise of that authority by the corporate body itself. *OSGOOD v. NELSON* [636]

DETINUE: *See BANKRUPTCY.*

DEPOSIT OF TITLE-DEEDS.] *Per Lord Cairns*:—A deposit of title-deeds, as security for a debt, will, without more, create in Equity a charge upon the property: but where it is accompanied by a written document, the terms of that document must be referred to in order to ascertain the exact nature of the charge. *SHAW v. FOSTER* [321]

DEVISES OVER: *See WILL.*

DIRECTORS: *See COMPANY.*

1. Facts which may shew imprudence in the exercise of powers undoubtedly conferred upon directors will not subject them to personal responsibility; the imprudence must be so great and manifest as to amount to *crassa negligentia*.—Where the directors to whom these powers were intrusted, and who exercised them, were, by the "Company" which had conferred the powers, afterwards sought to be made responsible for their exercise:—*Held*, that malfeasance or *crassa negligentia* ought to have been distinctly charged.—The bill being defective in that respect:—*Held*, that it could not be sustained.—In a company formed for the purchase of a business, where the power to make the purchase was distinctly conferred on the directors, though the character of the business turned out to be ruinous, unless that character was obviously apparent when the purchase was made, the directors will not be personally responsible for making it.—In this case a prospectus was, in the usual manner, issued by the directors, but that prospectus in no way whatever affected the claim of the Plaintiff company to compensation for loss consequent on the purchase of the business, for the company was formed for the express purpose of purchasing the business, and was not induced to take that step by any previously-issued prospectus.—An agent (and the directors here were rather agents or mandataries than trustees) being authorized to do an act in itself imprudent, and one which the principal ought not, as a matter of prudence, to have authorized, is not to be held responsible for the consequences of doing it.—*Turquand v. Marshall* (Law Rep. 4 Ch. Ap. 376) explained. *OVEREND AND GURNEY COMPANY v. GIBB* - - - - - 480

2. — *W.* was an official in *Scotland* of an English company; the company desired to have a board of directors there. *W.* suggested to *D.*, who lived in *Scotland*, to take shares and become one of the intended directors. *D.* objected on the ground that it was not a company of limited liability; *W.* assured him that he should be secured against loss, and that a bill was then about to be presented to Parliament to limit the shareholders' liability. *D.* thereon consented, and *W.* applied in his name for ten shares, obtained an

DIRECTORS—*continued*.

allotment of ten, and paid the deposit on them. This deposit was never repaid by *D.* to *W.* *D.*, at *W.*'s request, signed a proxy paper, and also a receipt for a dividend, which, however, was in fact paid to *W.* The bill in Parliament was not passed. Some time afterwards a call was made on *D.* in respect of his shares, of which he took no notice; another call was made; he denied his liability, and desired *W.* to state the facts to the directors, and to claim his discharge from liability. *W.* did so; and the directors, who, by the resolution of a general meeting, possessed powers to make compromises in disputes with shareholders (though not, in terms, to cancel shares), consented that, on *D.*'s paying a certain call then due, his shares should be cancelled. The money was paid, and *D.*'s name was struck out of the list, and a balance sheet with his name struck out was presented at a general meeting as containing a list of persons whose shares had been cancelled. So things remained till some years afterwards, when the company was ordered to be wound up; and *D.*'s name was put upon the list of contributories:—*Held*, that it must be removed therefrom; that the directors had had the power to make a compromise of a disputed claim, that this case came within the power, and that the power had been *bonâ fide* and rightly exercised. *DIXON v. EVANS* [606

3. — In a winding-up, the funds contributed by the B list of shareholders become part of the general assets of the company, and are not to be applied, preferentially or exclusively, to the payment of those debts which were incurred before the B shareholders retired from the company.—The 38th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), makes the "past members" (persons who have become so by retiring from the company within a year before the date of the winding-up order) liable to contribute to the assets of the company for the payment of the debts and liabilities of the company, but, though they are not specifically liable to satisfy debts which have been contracted since they left the company, yet, when they have become liable to contribute to the assets of the company, and have so contributed, their contributions become part of the general assets, and cannot be appropriated exclusively to the payment of those debts which had been incurred before these members retired from the company.—The word "assets" in the 38th section of this statute means the same as the word "property" in the 133rd section, and both alike mean all the unpaid capital recoverable, as well as the other property of the company.—Observations by Lord Cairns on the duty of the liquidators in making calls on the past members of a company. *WEBB v. WHIFFIN* - - - 711

DISCHARGE OF JURY.] A Court has power to discharge, by consent, a jury from giving a verdict upon any of the issues in a case; and where the jury has been discharged, and the record does not shew that it was done without consent, the discharge must be taken to be regular, and cannot be made the ground of error. *SCOTT v. BENNETT* [234

DISCLAIMER: See **PATENT**.

DOMICILE: See **SUCCESSION DUTY**.

EASEMENT; See **COMPENSATION**.

EJECTMENT; See **LEASE;** **NOTICE**.

EQUITY: See **INJUNCTION;** **TRUST**.

ERROR:

1. The decision of one of the Superior Courts pronounced on motion (unless where otherwise provided by statute) is not the subject of a proceeding in error.—A statute which declares that a particular course of proceeding shall not be necessary, in effect renders that course of proceeding mere surplusage.—A Court has power to discharge, by consent, a jury from giving a verdict upon any of the issues in a case; and where the jury has been discharged, and the record does not shew that it was done without consent, the discharge must be taken to be regular, and cannot be made the ground of error.—In like manner, where a Court has power to give costs upon a certificate or order, and it does not appear (apart from a suggestion of error in fact) that there was no certificate or order, the taxation by the Master cannot be impeached by a proceeding in error.—*Banks v. Newton* (11 Q. B. 340) overruled.—*Per Lord Chelmsford*:—Where the Defendant could, before judgment, have suggested the matter afterwards alleged as error, he cannot, by his subsequent suggestion of it, release himself from costs. *SCOTT v. BENNETT* - - - 234

2. — *Per The Lord Chancellor (Lord Hatherley)*:—The 32nd section of the 17 & 18 Vict. c. 125, merely gives to the Court of Error the power to correct inferences wrongly drawn by the Court below; but where the Court below had no power to draw them, the Court of Error is in the same position. *LATTER v. WHITE* - - - 578

3. — *Held*, that the Court of Appeal had, under 21 & 22 Vict. c. 72, s. 39, the *Landed Estates Act*, full power to set right, in all respects, the decision of the Court appealed from, without any necessity for any fresh proceedings.—*Per Lord Chelmsford*:—The proviso in the 64th section of that statute is confined to the case of an "owner" not absolutely entitled to the money produced by the sale of the estate.—Observations by Lord Cairns on the manner in which this covenant in the marriage articles would have been executed by the Court of Chancery upon a bill filed for specific performance. *GRIER v. GRIER* - - - 688

"ESTATE TAIL IN POSSESSION": See **WILL**. 3.

EVIDENCE: See **CALLS;** **NOTICE;** **NOTICE TO QUIT;** **PATENT;** **PRACTICE;** **STAMP**.

EXCHANGE, BILL OF: See **BILL OF LADING;** **WINDING-UP**.

Where a bill of lading, and a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to a vendee of the goods, it is a well understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained.—Where the bill of exchange is not accepted, but the bill of lading is retained, the bill of lading, acquired in that manner, gives no right of property to the person so acquiring it. *SHEPHERD v. HARRISON* - - - 116

EXECUTORY DEVISE OR COVENANT.] A settlement made by the third Earl of Harrington declared the manner in which a mansion-house and

EXECUTORY DEVISE OR COVENANT—*cont.*

certain estates in the county of *Derby* should descend.—A will of the settlor, made many years afterwards, gave personal chattels “in trust for the person or persons who for the time being shall, under the settlement of my mansion-house and estates, be in the actual possession of the same mansion-house and estates, to the end and intent that all and singular such [personal chattels] may be deemed and considered as heir-looms, to go along and for ever be used and enjoyed with the same mansion-house and estates, (so far as the rules of law or equity will permit,) but so nevertheless as that the same chattels personal shall not, as to the effect or purpose of transmission, vest absolutely in any person or persons who by virtue of any settlement shall or may become seised of or entitled to the said mansion-house and estates for an estate of inheritance, either in possession or reversion, or otherwise, unless such person shall attain the age of twenty-one years, or dying under that age, shall leave issue inheritable under the limitations in any settlement thereof.”—*Held*, that this was not an executory devise. *HARRINGTON v. HARRINGTON* - 87

—Observations by Lord *Cairns* on the manner in which a covenant to *settle* lands would be executed by Chancery. *GRIER v. GRIER* - 688

FOREIGN COMPANY: See COMPANIES ACT.**FRAUD, IMPLIED:** See MISDIRECTION.

GALEE.] *Semble*, that galees under the Crown of mines in the *Forest of Dean* are occupiers, and as such are liable (where the mine is by law the subject of rating) to be rated as occupiers to the relief of the poor of the parish.—*Per Lord Chelmsford*:—The interest of a galee is, under the 24 & 25 Vict. c. 40, of the nature of real estate, and is capable of occupation. *MORGAN v. CRAWSHAY* - - - - - 304

HEIR-LOOMS: See WILL.**INFRINGEMENT:** See INJUNCTION.**INJUNCTION:** See PATENT.

In order to constitute a ground for interference by a Court of Equity to protect a manufacturer against the use, by another person, of the particular name of his manufactured article, it is not necessary that there should be a *mala mens* towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled through this unwarranted designation to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured.—Where a trade mark is not actually copied, the existence of a fraudulent intention is a necessary element in the consideration of a case of this description. The party complained of must be proved to have done the act with the fraudulent design of passing off his own goods as those of the Plaintiff. It is not necessary, however, to shew an exact resemblance between the original and the counterfeit—it is sufficient if there is such a resemblance as will mislead an unwary purchaser.—A name may become a trade denomination, and as such the property of a particular person who first gives it

INJUNCTION—*continued.*

to a particular article of manufacture. The employment of the name by another person for the purpose of describing an imitation of that article, is an invasion of the right of the original manufacturer, who is entitled to protection by injunction. *WOTHERSPOON v. CURRIE* - - - 508

INTEREST, VESTED: See SUCCESSION DUTY.**INVOICE:** See BILL OF LADING.**IRELAND:** See COMPULSORY POWERS; LANDED ESTATES ACT; LEASE; NOTICE; RAILWAY. 2.**IRISH RAILWAYS:** See RAILWAY. 2.

IRON MINES.] Iron mines and all other mines, except coal mines, are, under the Statute of *Elizabeth*, exempt from liability to the poor-rate. The statute mentioning mines mentions coal mines only, and a long course of decision has established that the rule *expressio unius est exclusio alterius* applies to the enactment.—*Per Lord Chelmsford*:—If the question was now to be considered for the first time, though it might be difficult to satisfy the mind why the statute mentions coal mines alone as the subjects of taxation, the ordinary rules for the construction of statutes would have the effect of excluding any implied intention on the part of the Legislature beyond, or different from, what it has expressed. *MORGAN v. CRAWSHAY* - - - - - 304

JOINT STOCK COMPANIES: See REGISTRATION.**JURY:** See DISCHARGE OF JURY.**JUS DISPONENDI:** See BILL OF LADING.

LANDED ESTATES ACT.] The Court of Appeal has, under 21 & 22 Vict. c. 72, s. 39, the *Landed Estates Act*, full power to set right, in all respects, the decision of the Court appealed from, without any necessity for any fresh proceedings.—*Per Lord Chelmsford*:—The proviso in the 64th section of that statute is confined to the case of an “owner” not absolutely entitled to the money produced by the sale of the estate.—Observations by Lord *Cairns* on the manner in which this covenant in the marriage articles would have been executed by the Court of Chancery upon a bill filed for specific performance. *GRIER v. GRIER* - - - - - 688

LANDLORD AND TENANT: See EJECTMENT; NOTICE.

LEASE.] In February, 1863, *J. K.* made a lease of land to *L.* The land demised really amounted in quantity to, and was described in the lease as containing, 5A. 2R. 20R., and the rent was fixed at £100 a year. The lease contained a clause declaring that it should be lawful “for *J. K.*, upon giving to *L.*, his executors, &c., or leaving at their usual or last known places of abode, three months’ previous notice in writing of an intention to re-sume, for building purposes, the possession of any portion of the premises demised, to enter into such possession.” It was agreed that “the portion or quantity of the ground so taken shall be valued at the rate of £20 per statute acre, and that the rent hereby reserved shall be proportionably reduced.” *J. K.*, in November, 1864, executed a deed by which he constituted himself and *V. K.*, his brother, tenants in common of the land. In

LEASE—*continued.*

October, 1865, a notice signed by both *J. K.* and *V. K.* was served on *L.*, declaring, in the words of the lease, their intention to resume, for building purposes, possession of the whole of the premises:—*Held*, that they were entitled to do so; that the clause respecting the proportionate diminution of the rent did not restrict them to the exact amount of five acres; that the deed of 1864 did not destroy the right of entry reserved by the lease; that the two brothers were, under the 23 & 24 Vict. c. 154, s. 1, "the landlord" entitled to the possession; and that the notice signed by *J. K.*, whether taken as given for himself alone, or as given by him for himself and his brother, was perfectly good.—The ejectment here was consequential on the notice, and not upon any breach of covenant, and the right of re-entry arising upon the expiration of the notice, there was no necessity for an actual entry in order to maintain the ejectment.—The tenant's right to compensation did not, by the terms of the lease, arise till the landlord had obtained possession of the land.—The notice was served by a messenger at the house of *L.*, who was then absent from home, but the notice was taken in by a woman who appeared to live there, who said that *L.* was then absent, but would be back in a few days, when she promised to give him the notice. No explanation of its contents or object was given to her:—*Held*, that, under the words of the lease, this service of the notice was sufficient. *LIDDY v. KENNEDY* - - - - - 134

LEGACY DUTY : See SUCCESSION DUTY.

LETTERS OF CREDIT : See AGREEMENT.

LIQUIDATORS : See CALLS; COMPANY; DIRECTORS.

1. Past members who deem the statements of liquidators on a winding-up to be insufficient to justify calls made on them, must not wait till after a decision has been pronounced on those statements, and has been made the subject of appeal, but must at the time of those statements being made submit them to the process of a cross-examination. *HELBERT v. BANNER* - - - 28

2. — Observations by Lord Cairns on the duties of a liquidator in settling the calls on the B list of contributories. *WEBB v. WHIFFIN* 711

MARKET : See MAURITIUS.

MARRIAGE ARTICLES.] A covenant in marriage articles to settle an estate, after the payment of an annuity to the intended wife, "upon his issue" by the said intended wife, must be construed as a covenant for strict settlement, and excludes the husband from creating charges in favour of younger children.—By articles of marriage it was recited that the intended husband had received a sum of £600 from *J. S.*, his intended wife, and he covenanted to settle upon her an annuity of £60 for her life, to commence from his death, charged upon his lands, with the ordinary powers of distress and entry, and to settle the residue and remainder of his said lands "upon his issue by the said *J. S.*, his intended wife. There were several children of the marriage. Some years after the marriage he executed a deed by which he charged on his lands various sums of money in favour of younger children, devising the lands themselves to his eldest son and his other sons

MARRIAGE ARTICLES—*continued.*

successively in tail male:—*Held*, that this deed creating these charges was void, for that the covenant in the articles gave him no power to charge the lands for the benefit of the younger children, and must be interpreted to mean that he would settle the lands in the ordinary form of strict settlement.—The younger children had, in the character of "incumbrancers," obtained an order from the Landed Estates Court in *Ireland* for a sale of the lands and a distribution of the money, the produce thereof. This was done. But some time afterwards the eldest son, as "owner" of the lands, brought the whole matter by appeal before the Court of Chancery in *Ireland*, which reversed this order of the Landed Estates Court, and (the money having been brought into Court) directed it to be paid out to the eldest son.—In this House the decree of the Court of Appeal was confirmed. *GRIER v. GRIER* - - - - - 688

MAURITIUS.] In the *Mauritius* market it is often impossible to obtain so large a quantity of sugar as 500 tons from one house, or to find a vessel fit to take it. *Quære*, Whether an order from *England* sent to commission merchants there to purchase and ship such a cargo must be construed with reference to the custom of that market. *IRELAND v. LIVINGSTON* - - - - - 395

MINES : See IRON MINES.

MISDIRECTION.] The mere refusal by a Judge to direct a jury to find for a Plaintiff or a Defendant does not constitute misdirection. The evidence on which his refusal was founded and the reasons for impeaching it must be stated to him at the time.—In an interpleader issue *B.* claimed certain iron as his property. The iron had been seized under a writ of *fi. fa.* issued at the suit of *F.*, a judgment creditor of the *L.* railway company, in whose possession the iron was when the seizure took place. The evidence shewed that the *L.* company had obtained possession of the iron through the act of *G. & K.* These persons had purchased it from *B.*, and had given bills for it, which were in danger of not being honoured. In that state of circumstances they represented to *B.* that if he would allow them to have possession of it and to hand it over to the *L.* company, that company would become in a position to exercise its borrowing powers under its Act, and *G. & K.*'s bills could then be honoured. *B.* said that he would consent, provided that his rights were not impaired. *B.*'s agent accordingly delivered the iron to *G. & K.*, who then put it into the possession of the *L.* railway company, after which it was taken in execution under the *fi. fa.* At the trial of the interpleader issue the Defendant's counsel contended that by the transfer of the iron with the bills of lading the property had completely passed to the *L.* railway company, and on that ground called on the learned Judge to direct a verdict for that company. The learned Judge refused, and the jury found a verdict for the Plaintiff *B.* This verdict was sustained in the Queen's Bench on motion for a new trial; and the Exchequer Chamber affirmed that decision. On appeal to this House it was contended that *B.*'s permission to allow the iron to be put into the possession of the railway company was an illegal contrivance to evade the provisions of the com-

MISDIRECTION—*continued.*

pany's Act, and thus enable a cheat to be practised upon the persons from whom the company proposed to borrow money, and being so, deprived *B.* of the right to assert his title to the iron which he had, for such fraudulent purpose, allowed to be transferred to the company, and that the Judge had been guilty of a misdirection in not directing on this ground a verdict for the Defendants:—*Held*, that this objection which had not been raised at the trial could not now be received; that such objection ought to have been presented and substantiated by evidence at the trial; that on it the learned Judge should have called on to give his direction to the jury; and that as nothing of this sort had been done there was no misdirection. *GREEN v. BATEMAN* - - - 591

MORTGAGE: See ASSIGNMENT; DEPOSIT OF DEED; VENDOR AND PURCHASER.

NAME: See TRADE MARK.

A name may be a trade mark, and, as such, the property of the particular person who first gave it to a particular article of manufacture. *WOTHERSPOON v. CURRIE* - - - 508

NOTICE: See ASSIGNMENT; LEASE.

A notice to the vendor of an estate that the vendee has deposited the contract with a third party, *A.*, and has entered into an agreement with *A.* to make to *A.* "a valid assignment" of the contract, does not bind the vendor to make inquiries whether the agreement between the vendee and *A.* has been carried into effect; nor will it compel the vendor to refuse to execute the conveyance to the vendee, who, upon the payment of the purchase-money, demands the conveyance, nor even excuse the vendor for making such a refusal. The persons who claim to have the benefit of the assignment must give distinct notice to the vendor of their claim, and of their readiness to put themselves in the vendor's position for the completion of the contract. *SHAW v. FOSTER* 321

NOTICE, SERVICE OF: See LEASE.

1. A notice to terminate a tenancy was served by a messenger at the house of *L.*, who was then absent from home, but the notice was taken in by a woman who appeared to live there, who said that *L.* was then absent, but would be back in a few days, when she promised to give him the notice. No explanation of its contents or object was given to her:—*Held*, that this service of the notice was sufficient. *LIDDY v. KENNEDY* - 134

2. — The service of a notice to quit made at the house of the tenant upon a person whose duty it would be to deliver the notice to the tenant, is sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant.—The presumption in such a case is that it did reach the tenant himself.—In such a case the question is not whether the servant performed his duty in delivering it to his master, but whether the servant was to be considered as the agent of the master to receive the notice. If he was, the service of the notice will effectually bind the master.—*Per* The Lord Chancellor (Lord *Hatherley*):—The fact that the agent who received the notice destroyed it would liberate entirely the person who delivered the notice, but would not liberate the person

NOTICE, SERVICE OF—*continued.*

whose agent had received and destroyed it.—*Per* Lord *Westbury*:—Where there has been service of a notice to quit left at the tenant's house with a servant of the tenant, such a fact is more than presumptive evidence of a service on the tenant. The landlord's right would otherwise be controlled by something to which the landlord was an utter stranger.—*Per* Lord *Westbury*:—But even if only presumptive evidence of the service, the evidence to rebut it must be proof of the fact that the notice did not come to the knowledge of the tenant at all.—*T.* lived in a house where his two sons and his daughter also resided. *T.* was imbecile. The house was managed by his daughter, the farming business by his two sons. A notice to quit, addressed to the father, was served at the house by delivery to the daughter. She put it on the dresser in the kitchen, and afterwards burnt it. One of the sons knew of its existence, but was not shewn to have known its exact terms, though he was aware of its nature:—*Held*, that this was a service sufficient to entitle the landlord to maintain ejectment against the father. *TANHAM v. NICHOLSON* - - - 561

OFFICE: See CORPORATION.

OSTER: See TENANTS IN COMMON.

PARTIES: See TRUST.

"**PAST MEMBERS**": See CALLS; COMPANY.

PATENT: See INJUNCTION; TRADE-MARK.

1. *B.* held an English patent for the manufacture of a combined metal, to be (among other purposes) applied as capsules to put on bottles. *T.* (who resided and carried on the business of a brewer in *Scotland*) purchased, from a foreign manufacturer, capsules, made according to the process described in *B.*'s patent, and, in *Scotland*, put these capsules upon his beer bottles, which he then sent to his agents in *England* for transhipment and exportation. There was no evidence that the beer was sold in *England* for consumption here:—*Held*, that though the capsules were put on in *Scotland*, their user while the beer remained here was a continued user of them which amounted to an infringement of the patent.—In ordinary cases the duty of establishing that the thing patented has been pirated lies on the patentee, and Courts of Equity grant limited orders of inspection for the purpose of enabling them to discharge that duty. Such orders cannot be granted where the piracy alleged has taken place abroad.—*Seemle*, that then it becomes the duty of the defendant to give evidence of a negative character to prove (in answer to the *prima facie* case made by the patentee) that the process used was of a different character from that which had been patented.—Where that negative evidence was not given by the Defendant, but positive evidence on the part of the patentee was given by one workman that he had been employed at the foreign manufactory, and there saw the capsules manufactured by a process not distinguishable from that of the patentee:—*Held*, that these circumstances justified the conclusion of identity of material and process, and were sufficient warrant for the grant of an injunction.—Where a patent had been taken out by *D.* in 1804, and another

PATENT—continued.

patent had been taken out by *B.* in 1849, and *B.* took proceedings against *N.* for infringement, to which *N.* set up as an answer want of novelty, and proved *D.*'s patent, evidence of all that was done in the trade to which the patent related between the date of *D.*'s patent and of *B.*'s patent, was admissible on this question of novelty.—*Per Lord Colonsay*:—It is not enough that there has been in a former patent a general disclosure of the object to be attained, unless there is a specification clearly pointing out the mode of attaining it.—After a patent has stood inquiry and the test of time, Courts do not encourage verbal objections to the form of the specification.—If a claim to the production of a material can be substantiated, the description of a particular use to which it can be applied, which may be comprehended in the general description of its uses, but is also specially set forth in the specification, will not constitute an objection to the validity of the patent.—A patent having been sustained, the decree granted an injunction against farther infringement, directed an inquiry as to damages, and an account of profits. The decree was varied by striking out the order for the account of profits.—But in this case the variation of the decree was held not to affect the patentee's right to costs. *NEILSON v. BETTS* 1

2. — A patent may be sustained though each principle or process in it was previously well known to all persons engaged in the trade to which the patent relates, provided that the mode of combining these processes was new, and produced a beneficial result, and provided, also, that the specification claimed not the old processes, or any one of them, but only the new combination.—A patent was taken out for an improvement in the mode of manufacturing glass. The old mode had been that of putting the materials which were to form the glass in pots placed on "sieges," or benches, with the fire underneath, the rising flames of which played around them, and when they became too hot and cracked they were removed from their position, and the overheated and cracked parts were presented to a current of cooling air, and the molten material was thus, partially at least, saved from waste, and the cracks in the pots were stopped up with a portion of it, and were thus preserved from destruction. The new method consisted in adopting some previous improvements (such as suppressing the fire pots, placing the materials in a tank, &c.), to which the patentee laid no claim, and in combining these things with an improved furnace. His invention consisted of "forming the sides of the tank or chamber containing the glass-making materials hollow, in such wise that a current of refrigerating air may circulate and prevent any excessive heating of the sides which retain or inclose the fused materials." Though all the principles upon which the new method was based were well known, the new form of combining them was shewn to make the melting of the materials less subject to danger and less costly in use:—*Held*, that this new form of combination, being useful and valuable, constituted a valid ground for a patent:—*Held*, also, that a direction to a jury that, if the combination was new and was useful, the patent could be supported, though each separate process employed in it was previously known, was correct.—*Per Lord*

PATENT—continued.

Westbury:—If there is a patent for a combination of machinery originally directed to one purpose, and a person afterwards adopts that combination in order to make it minister to another and additional purpose, his doing so constitutes an infringement of the patent. *CANNINGTON v. NUTTALL* 205

PERPETUITIES: See WILL. 3.

PLEADING.

1. Where an action of trespass had been erroneously brought by one tenant in common against another, the Court below refused to allow an amendment of the declaration by converting the action into one for an account under that statute:—*Held*, that the refusal was right. *JACOBS v. SEWARD* - - - - - 464

2. — Facts which may shew imprudence in the exercise of powers undoubtedly conferred upon directors will not subject them to personal responsibility; the imprudence must be so great and manifest as to amount to *crassa negligentia*.—Where the directors to whom these powers were intrusted, and who exercised them, were, by the "Company" which had conferred the powers, afterwards sought to be made responsible for their exercise:—*Held*, that malfeasance or *crassa negligentia* ought to have been distinctly charged.—The bill being defective in that respect:—*Held*, that it could not be sustained. *OVEREND & GURNEY COMPANY v. GIBB* - - - - - 480

POOR-RATE.] Iron mines and all other mines, except coal mines, are, under the Statute of *Elizabeth*, exempt from liability to the poor-rate. The statute mentioning mines mentions coal mines only, and a long course of decision has established that the rule *expressio unius est exclusio alterius* applies to the enactment.—*Per Lord Chelmsford*:—If the question was now to be considered for the first time, though it might be difficult to satisfy the mind why the statute mentions coal mines alone as the subjects of taxation, the ordinary rules for the construction of statutes would have the effect of excluding any implied intention on the part of the Legislature beyond, or different from, what it has expressed.—*Semble*, that galees under the Crown of mines in the *Forest of Dean* are occupiers, and as such are liable (where the mine is by law the subject of rating) to be rated as occupiers to the relief of the poor of the parish.—*Per Lord Chelmsford*:—The interest of a galee is, under the 24 & 25 Vict. c. 40, of the nature of real estate, and is capable of occupation, so as to be liable to poor-rate. *MORGAN v. CRAWSHAY* - - - - - 304

"POSSESSION": See WILL. 3.

PRACTICE: See COSTS; ERROR; MISDIRECTION.

1. In ordinary cases of patents the duty of establishing that the thing patented has been pirated lies on the patentee, and Courts of Equity grant limited orders of inspection for the purpose of enabling him to discharge that duty. Such orders cannot be granted where the piracy alleged has taken place abroad:—*Semble*, that then it becomes the duty of the Defendant to give evidence of a negative character to prove (in answer to the *prima facie* case made by the patentee) that the process used was of a different character from that which had been patented.—Where that negative

PRACTICE—continued.

evidence was not given by the Defendant, but positive evidence on the part of the patentee was given by one workman that he had been employed at the foreign manufactory, and there saw the capsules manufactured by a process not distinguishable from that of the patentee:—*Held*, that these circumstances justified the conclusion of identity of material and process, and were sufficient warrant for the grant of an injunction. *NEILSON v. BETTS* - - - 1

2. — Where a Plaintiff has closed his evidence, and the Judge who tries the cause is of opinion that there is no case to go the jury, he ought to direct accordingly, giving leave, if necessary, for the Plaintiff to move to enter a verdict in his favour. But it is erroneous under such circumstances to take a formal verdict for the Plaintiff, reserving leave to the Defendant to move to enter a verdict for him should the Judges (to whom power is reserved to draw inferences of fact) be of opinion that on the facts the verdict ought to be so entered. *DANIEL v. METROPOLITAN RAILWAY COMPANY* - - - 45

3. — The power given by the 124th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), to a Court of Appeal to extend the time for appealing may be exercised after the time given by that statute for giving notice of appeal has expired. *BANNER v. JOHNSTON* - - - 157

4. — The decision of one of the Superior Courts pronounced on motion (unless where otherwise provided by statute) is not the subject of a proceeding in error.—A Court has power to discharge, by consent, a jury from giving a verdict upon any of the issues in a case; and where the jury has been discharged, and the record does not shew that it was done without consent, the discharge must be taken to be regular, and cannot be made the ground of error. *SCOTT v. BENNETT* [234

5. — There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will. *MARTELLI v. HOLLOWAY* - - - 532

6. — Where there has been a decree (all the parties interested being before the Court), long acquiesced in, which declared a direction for accumulation to be void for remoteness, but also declared that the will was well executed, and that the trusts thereof (except that direction) ought to be carried into effect, the presumption will be that a possible objection to a similar clause in the will had not been overlooked, but had been considered and decided on before the declaration to carry the trusts of the will into execution was made. *MARTELLI v. HOLLOWAY* - - - 532

7. — At the trial of an interpleader issue the Defendant's counsel contended that by the transfer by the Plaintiff to a railway company of certain iron (the subject of contest) under the authority of bills of lading, which were handed over with the iron, the property in the iron had completely passed to the company, against which the Defendant had issued his *fi. fa.* and seized

PRACTICE—continued.

the iron. The jury returned a verdict for the Plaintiff, which was sustained in the Court below. On appeal to this House it was contended (for the first time) that this transfer of the iron to the company had been a mere fraudulent contrivance to enable the company to bring its borrowing powers into operation under its private Act, and thereby defeat the protection which that Act had intended to give to lenders of the money, and was consequently illegal, and therefore deprived the Plaintiff of the right to set up any title to the iron:—*Held*, that this objection not having been set up at an earlier period could not now be received. *GREENE v. BATEMAN* - - - 591

8. — At the Rolls, where the case was first heard, *D.*'s name was ordered to be removed from the list of contributories. On appeal, the Lord Justice directed it to be replaced on the list. This House reversed the Lord Justice's order, restored that of the Master of the Rolls, and directed that the costs on the appeal in the Lord Justice's Court should be repaid to *D.* *DIXON v. EVANS* [606

9. — Where there is a remedy at Law, and a corresponding remedy in Equity, supplementing that of the Common Law, and a legal remedy is subject by statute to a limit in point of time, a Court of Equity in affording the correspondent remedy will act by analogy to the statute, and impose on the remedy it affords the same limit as to time. *KNOX v. GYE* - - - 656

PRECAUTIONS : See RAILWAY.

PRESUMPTIVE EVIDENCE : See NOTICE TO QUIT.

PRINCIPAL AND AGENT : See BANKRUPTCY ;
STAKEHOLDER.

PRIVACY : See COMPENSATION.

PROFITS : See COSTS. 1.

"PROVIDED ALWAYS :" See WILL. 3.

RAILWAY.

1. Where works are going on over a line of railway, with which works the railway company has nothing to do, and the execution of such works is entrusted to contractors who are entirely independent of the railway company, it is not the duty of the railway directors to assume that such works will be negligently conducted by those who have contracted for their execution, and to take precautions against possible negligence on the part of persons who are not in their employment nor under their control.—*Per* The Lord Chancellor (*Lord Hatherley*):—If railway directors undertake to carry passengers over their own line, and also over another line, they would be bound to see that their own was in perfect order, and would be responsible for any negligence occurring on the other line, over which they had contracted to carry passengers, whether under their control or not, but would not be responsible for matters altogether extraneous to the work in which they were engaged, unless there was reasonable ground for apprehending that extraordinary precautions were required.—*Per* Lord Colonsay:—If the operation which the contractors were performing was one which, according to previous knowledge and experience, was, however carefully performed, likely to lead to mischief, it would be incumbent

RAILWAY—continued.

on the railway company to foresee and take precautions against it.—The Corporation of the City of London was authorized by an Act of Parliament to execute certain works over the line of the *Metropolitan Railway Company*. These works consisted partly in placing heavy iron girders upon the walls running along the line of railway, and were therefore works in the execution of which danger was involved, but which were often executed elsewhere without mischief. The railway company had no control over these works, which were executed by contractors engaged by the Corporation. Several girders had been safely put in their places by manual labour, but, on this occasion, the contractors brought into use for one of the girders a monkey steam-engine, which moved the girder with a jerk, and so caused it to overbalance and fall. It fell on a passing train, and injured the Plaintiff:—*Held*, that this was not a mischief the occurrence of which the railway company was bound to anticipate, and against which it was bound to take precautions, and consequently that the railway company was not liable in damages. *DANIEL v. METROPOLITAN RAILWAY COMPANY* - - - - - 45

2. — The 14 & 15 Vict. c. 70 (the *Railways Act, Ireland, 1851*), applies to every railway in *Ireland*. It makes provision for ascertaining the compensation to be awarded to any landowners whose lands are taken under any private Railway Act, and requires (s. 14) that certificates of the amount of compensation awarded by the arbitrator shall be delivered by the company to the person entitled, and payable on demand (s. 15). The 21st section enacts, that where the company shall not deliver the certificate “to any person claiming to be entitled to any interest in any lands the possession whereof has been taken by the company,” the right to have such certificate may be enforced by application to the Court of Chancery in *Ireland*, “in a summary way by petition;” and it then goes on to enact that “all other rights and interests of any party arising under the provisions of this Act may be in like manner enforced against the company by such application as aforesaid.”—

A. was the owner of land required by a railway company; notice of an intention to take his land under the compulsory powers of its Act (private and local, into which the *Lands Clauses Act, 1845*, and the *Railways Act, 1851*, were to be taken as incorporated) was given. The valuer under the *Railways Act, 1851* (Ir.), was appointed, and made his final award, which was not however delivered till a few days after the compulsory power to take the land under the local Act had expired. Abstracts of title, &c., were afterwards demanded by and supplied to the company, which, however, never entered into possession of the land. Before the time for the construction of the railway had expired, the landowner formally demanded the company's certificate of the amount awarded. This was never given. He then presented to the Court of Chancery in *Ireland* a petition praying that the company might be ordered to lodge the amount in the *Bank of Ireland*:—*Held*, that under the 21st section of the Act of 1851 the Court had power to grant this petition. *CORK AND YOUGHALL RAILWAY COMPANY v. HARNETT* - - - 111

RATING : See IRON MINES.

“**REASONABLE CAUSE.**” *OSGOOD v. NELSON* 636

REGISTRATION : See BANKER ; CONVEYANCE.

Where the requisite number of persons and the requisite forms of application are presented to the Registrar of Joint Stock Companies under the provisions of the *Companies Act, 1862*, though the persons applying for registration of a company may be foreigners, and though there may be many circumstances tending to shew that the company sought to be registered is, in several respects, a foreign company, he is not bound to refuse it registration.—If there are in it shares in conformity with the statute, though there may be others of a different kind, and though the principal business seems likely to be transacted abroad, he may still grant it registration.—A company having many of its shares transferable by delivery, but having also many “nominate shares,” *i. e.* shares which are the same as the ordinary joint stock shares in companies in this country, applied for registration. The seven shareholders who made the application were all resident abroad, and the first directors nominated were foreigners, and only one of them appeared to have even a temporary residence in *England*. The articles of association referred in several places to the English Law, and especially to the *Companies Act, 1862*. There was an office of the company in *Westminster*, but it was doubtful whether any general meeting was intended to be held in *London*, or other place in *England*. The Registrar granted it registration:—*Held*, that he was lawfully entitled to do so, that he was not bound to refuse the registration, and that, the registration having been thus actually made, the usual legal consequences of registration arose:—*Held*, therefore, that if the circumstances occurred which, by the *Companies Act, 1862*, s. 79, were such as, in the opinion of the Court, made it “just and equitable” that the company should be wound up, the Court might lawfully and properly issue the order for winding it up. *PRINCESS OF REUSS v. BOS* - - - - - 176

RELEASE : See COMPANY ; DIRECTORS ; LIQUIDATORS.

SERVICE OF NOTICE : See NOTICE.

By a lease notice of terminating the tenancy was required to be given to the tenant, his executors, &c., “or by leaving at their usual or last known places of abode,” &c. The notice was served by a messenger at the house of L., who was then absent from home, but the notice was taken in by a woman who appeared to live there, who said that L. was then absent, but would be back in a few days, when she promised to give him the notice. No explanation of its contents or object was given to her:—*Held*, that, under the words of the lease, this service of the notice was sufficient. *LIDDY v. KENNEDY* - - - 134

SPECIFICATION : See PATENT.

STAKEHOLDER : See BANKRUPTCY.

Where a deed of composition with creditors has been executed, under the terms of which certain persons, constituted trustees under the deed, are in possession of the promissory notes given to satisfy the amount agreed on as the composition, such trustees are, as between the parties to the

STAKEHOLDER—continued.

deed, stakeholders, and are not the servants either of the persons who gave the notes, or of the persons who, under the provisions of the deed, would be entitled to receive them. *LATTER v. WHITE* [578

STAMP.] The burden of proving an instrument to be unstamped lies, in the first instance, on the party who objects to its production on the ground that it is unstamped. Where there is no evidence on either side it will be presumed to have been stamped.—But when once satisfactory evidence has been given that at a particular time the instrument was unstamped, there is an end of any presumption of law in favour of its having been stamped, the onus of proof is shifted, and the party who relies on the instrument must prove it to have been duly stamped. *MARINE INVESTMENT COMPANY v. HAVISIDE* - 624

STATUTE: See BANKERS.

A statute which declares that a particular course of proceeding shall not be necessary, in effect renders that course of proceeding mere surplusage. *SCOTT v. BENNETT* - 234

STATUTES:

- 43 Eliz. c. 2: *See Morgan v. Crawshaw* 304
- 21 Jac. 1, c. 16: *See Knox v. Gye* - 656
- 4 Anne, c. 16: *See Jacobs v. Seward* - 464
- 8 Geo. 1, c. 14 (Ir.): *See Copland v. Davies* 366
- 33 Geo. 2, c. 14 (Ir.): *See Copland v. Davies* 366
- 40 Geo. 3, c. 22 (Ir.): *See Copland v. Davies* 366
- 8 & 9 Vict. c. 18: *See Cork, &c., Railway Company v. Harnett* - 111
- 13 & 14 Vict. c. 61: *See Osgood v. Nelson* 636
- 14 & 15 Vict. c. 70 (Ir.): *See Cork, &c., Railway Company v. Harnett* - 111
- 15 & 16 Vict. c. lxxvii.: *See Osgood v. Nelson* - 636
- 16 & 17 Vict. c. 51: *See Attorney-General v. Campbell* - 524
- - - *See Attorney-General v. Littledale* - 290
- 16 & 17 Vict. c. 113: *See Scott v. Bennett* 234
- 17 & 18 Vict. c. 125: *See Latter v. White* 579
- 19 & 20 Vict. c. 97: *See Knox v. Gye* - 656
- 19 & 20 Vict. c. 102: *See Scott v. Bennett* 234
- 21 & 22 Vict. c. 72: *See Grier v. Grier* 688
- 23 & 24 Vict. c. 154: *See Liddy v. Kennedy* - 134
- 24 & 25 Vict. c. 40: *See Morgan v. Crawshaw* - 304
- 25 & 26 Vict. c. 89: *See Helbert v. Banner*, 28; *Banner v. Johnston*, 157; *Princess of Reuss v. Bos*, 177; *Webb v. Whiffin*, 711.
- 25 & 26 Vict. c. 93: *See Duke of Buccleuch v. Board of Works* - 418
- 28 & 29 Vict. c. 99: *See Osgood v. Nelson* 636

STATUTES, CONSTRUCTION.] Though the preamble of one Act may appear to be directed against a particular evil, and though another Act may be passed to aid its application, the enactments of the second Act are not necessarily to be

STATUTES, CONSTRUCTION—continued.

confined to the special purpose which seemed to be the particular object that the first had in view. Its own words must be considered as explaining and defining its objects and its means. *COPLAND v. DAVIES* - - - - 358

STATUTE OF LIMITATIONS.] Where there is a remedy at Law, and a correspondent remedy in Equity, supplementing that of the Common Law, and the legal remedy is subject by statute to a limit in point of time, a Court of Equity in affording the correspondent remedy will act by analogy to the statute, and impose on the remedy it affords the same limit as to time.—Where, therefore, in the matter of enforcement of a legal right, the Court of Common Law would, under the provisions of the *Statute of Limitations*, refuse the enforcement after the lapse of six years from the accruing of the right of action, a Court of Equity will, where its power to grant relief is asked, for under similar circumstances, adopt the principle of the statute, and decline to grant such relief.—*T.* advanced £12,000 to *G.* on the terms of partnership. *T.* made a will, leaving this money equally between *K.* and *G.* *T.* died in December, 1854, before old *Covent Garden Theatre* was burned, which event took place in March, 1856. There had been, before December, 1854, negotiations between *G.* and one *H.* to allow *G.* the use of *Her Majesty's Theatre*; but though a sum of £5000 (part of *T.*'s £12,000) had been paid to *H.* under these negotiations, he had never performed his contract. *G.* finally brought an action against *H.*, and recovered judgment for £5000; but ultimately (after the death of *T.*, yet within six years of the date of a bill filed by *K.* for an account) consented to accept £2500 as a compromise. *K.*, in December, 1864, filed a bill against *G.* for an account of profits in the partnership with *T.*, and of what was due to *K.* in respect thereof, under *T.*'s will:—*Held*, that the title of *K.* under *T.*'s will began in December, 1854, and was barred, in Equity, by analogy to the *Statute of Limitations*, the bill not having been filed till 1864:—*Held*, also (*diss.* Lord Hatherley, L.C.): That the surviving partner not being a trustee for the executors of his deceased partner, the payment of the £2500 from *H.* within six years from the filing of the bill did not take the case out of the *Statute of Limitations.* *KNOX v. GYE* 656

SUCCESSION DUTY.] That person is the "successor," within the meaning of the 2nd and 15th sections of the *Succession Duty Act*, in whom existed a title to property before the Act came into operation, but who, by an event occurring after the Act, became entitled thereto in possession.—The true "successor," in the sense of the individual liable to pay duty, is the person coming into the possession of the property upon the expiration (after the Act), by death or otherwise, of a particular intervening estate.—The Act only applies to persons who, before the time of its passing, were, in law, entitled to a vested interest in the property, but could not enjoy it in possession until after the passing of the Act.—The 15th section of the *Succession Duty Act* does not impose any new duty upon the person taking by alienation, but, where reversionary property passes through a succession of persons, secures payment

SUCCESSION DUTY—continued.

of the duty imposed by the previous sections applicable to such a case.—Personal property to a large amount was, in July, 1829, settled on the proposed marriage of *J. D.*, for herself and her intended husband *C.*, for their joint lives, and the life of the survivor—then to their children—with a power of appointment in *J. D.*, the appointment to take effect after the death of *J. D.* and of her husband. In default of appointment, the property was, subject to the husband, *C.*'s, life estate, to be held on trust for such of *J. D.*'s next of kin as would be entitled if she had died unmarried and intestate. *J. D.* married *C.*, but died childless, and without having exercised the power of appointment. About two months before Mrs. *C.*'s death, her mother, Mrs. *D.*, made a will giving all her property to Mrs. *C.* and her husband for their lives, and the life of the survivor, then to their children, and in default, to her own brothers and sisters and a nephew. This will was never altered. Mrs. *C.* died in August, 1831, and her mother, Mrs. *D.*, then became, under the settlement of 1829, entitled to the reversionary interest in the settled property, subject to *C.*'s life estate. Mrs. *D.* died in July, 1832. The *Succession Duty Act* came into operation in 1853. *C.* lived till 1868. The brothers and sisters and nephew of Mrs. *D.* then became entitled in possession to the reversionary property bequeathed by her will:—*Held*, that there was no succession duty payable under sect. 2 of the *Succession Duty Act* in respect of the interest which vested in Mrs. *D.* on the death of her daughter; that, consequently, her legatees were not liable to pay such duty; that, under her will, they were liable for legacy duty under the Legacy Duty Acts; and that, being so liable, they were, under the concluding part of the 18th section of the *Succession Duty Act*, relieved from any farther payment under that Act. *THE ATTORNEY-GENERAL v. LITLEDALE* - 290

2. — Where personal property is bequeathed by a person not domiciled in this country, it is not, in the first instance, liable to legacy or succession duty on being paid to the legatee. But where the executor directed to collect foreign property and invest it here, has discharged the duty imposed on him, and has placed the fund, in the way required, in this country, any subsequent devolution of it becomes liable to duty, though the party on whom it may devolve may (like the testator) be domiciled abroad.—*A.* was domiciled in *Portugal*, but on a visit to this country made his will in the English form, and appointed executors, some of whom resided in *England*. He desired his executors to collect his property, which was in *Portugal*, to convert it into cash, pay certain legacies, and invest the residue in the English 3 per cents., to appropriate what they should think necessary to pay a life annuity of £50 to his sister, on the termination of which the appropriated fund was to revert to and form part of his residuary estate, and be divided (like the rest) among his three children. The executors exactly performed the directions of the trust; when the sister died the part appropriated to satisfy her annuity became divisible among the children:—*Held*, that this constituted a succession within the meaning of the 2nd section of the *Succession Duties Act*, and was

SUCCESSION DUTY—continued.

liable to the payment of succession duty.—*Wallace v. The Attorney-General* (Law Rep. 1 Ch. Ap. 1) commented on. *THE ATTORNEY-GENERAL v. CAMPBELL* - - - - 524

SUGAR : See *CONTRACT*; *MAURITIUS*.

TENANTS IN COMMON : See *COMMON*; *LEASE*.

When two persons are tenants in common of a field, the merely putting, by one of them, a lock upon the gate (not shewn to be kept locked) will not constitute an ouster so as to enable the co-tenant in common to maintain trespass. There must, for such a purpose, be other circumstances attending the act.—In order to enable one tenant in common to maintain trover against another, there must not merely be a carrying away of the property, but such a carrying away of it as will disable the party complaining from having the lawful use or benefit of the property, or there must be the destruction of it.—*A.* and *B.* were, without the knowledge of *C.*, tenants in common of lands. *C.* had held them under *A.* In March, 1867, *C.* received from *B.* notice to quit at the end of six months. He did not quit, but afterwards made an agreement with *A.*'s agent for the renewal of the tenancy, continued the cultivation of the land, and paid the rent under the new lease. While *C.* was still in possession *B.* demised the premises to *D.*, as from March, 1868, for six months. In June, 1868, *D.* entered the land, cut the grass, put a lock on the gate, and carried away the grass, and stacked it as hay:—*Held*, (assuming *C.* and *D.* to be tenants in common), that these circumstances did not amount to an ouster, so as to enable *C.* to maintain trespass against his co-tenant in common, *D.*, nor to a destruction of the common property so as to enable *C.* to maintain trover for the grass—but that his only remedy was to be sought under the 4 Anne, c. 16, s. 27, by a proceeding for an account. *JACOBS v. SEWARD* - - - 464

THAMES EMBANKMENT : See *COMPENSATION*.

Whether the soil of causeway formed on the soil of the *Thames*, such causeway being capable of use at the ebb, but covered with water at the flood is in the owner of the adjoining land, or he only possesses an easement over it, it is the subject of compensation under the *Thames Embankment Act*, 25 & 26 Vict. c. 93. *DUKE OF BUCKLEIGH v. BOARD OF WORKS* - - - - 418

Per Lord Cairns :—He was a riparian proprietor, having a right to the undisturbed flow of the river along the whole frontage of his property, and was entitled to damages for being deprived of this right. *Id. Ib.*

TITLE IN POSSESSION : See *SUCCESSION DUTY*.

TRESPASS : See *TENANTS IN COMMON*; *PLEADING*.

TRADE-MARK.] In order to constitute a ground for interference by a Court of Equity to protect a manufacturer against the use, by another person, of the particular name of his manufactured article, it is not necessary that there should be a *malum* mens towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled through this unwarranted designation to retail a stimulated article at a lower price than would be demanded for the original article, and

TRADE MARK—*continued.*

so the original manufacturer may be injured.—Where a trade-mark is not actually copied, the existence of a fraudulent intention is a necessary element in the consideration of a case of this description. The party complained of must be proved to have done the act with the fraudulent design of passing off his own goods as those of the Plaintiff. It is not necessary, however, to shew an exact resemblance between the original and the counterfeit—it is sufficient if there is such a resemblance as will mislead an unwary purchaser.—A name may become a trade denomination, and as such the property of a particular person who first gives it to a particular article of manufacture. The employment of the name by another person for the purpose of describing an imitation of that article, is an invasion of the right of the original manufacturer, who is entitled to protection by injunction. *WOTHERSPOON v. CURRIE* - - - - - 508

TROVER: See COMMON (TENANTS IN).

TRUST AND TRUSTEE: See BANKERS; DIRECTORS; VENDOR AND PURCHASER.

1. — The rule of Equity that a vendor of an estate is, after the making of the contract of sale, a trustee for the purchaser, does not apply to a case where the vendor has entered into a contract with a third party to assign the contract to him, does not bind the vendor to see that the stipulations of that contract have been performed, or to make the conveyance to the assignee on the presumption that they have been so performed. *SHAW v. FOSTER* - - - - - 321

2. A memorandum accompanying a deposit of deeds made as security for a debt, and made by a person carrying on the ordinary business of a Banker, is therefore within the provisions of the 33 Geo. 2, c. 14 (*Ir.*), and ought, according to their requirements, to be registered, in order to be valid as against creditors under a trust deed executed pursuant to the provisions of that Act.—The memorandum might have been registered, and ought to have been registered, even though the stoppage of payment by the Banker took place within one month after its date.—A trust deed so executed will be valid for all purposes affecting the distribution of the estate among the creditors, though it should be followed by a general bankruptcy.—The 10th section of the statute, which relates to the approval of a trust deed by the majority of the creditors, is merely directory. *COPLAND v. DAVIES* - - - - - 358

3. — *Per Lord Westbury*:—There is no fiduciary relation between a surviving partner and the representatives of his deceased partner: there are legal obligations between them equally binding on both.—*Per The Lord Chancellor (Lord Hatherley)*:—There is a fiduciary relation between them. The surviving partner alone having the legal interest in the partnership property, and being alone able to collect it, there arises a right in the representatives of the deceased partner to insist on the surviving partner holding the property, whenever received, subject to the rights of the deceased partner, and he cannot make use of the partnership assets without being liable to an account for them. This rule applies where there have been accounts settled between the representa-

TRUST AND TRUSTEE—*continued.*

tives of the deceased partner and the surviving partner, and the latter afterwards receives a debt due to the partnership, recognised in the settlement of the partnership accounts, but not at that time received from the debtor. *KNOX v. GYE* - 656

VARIATION OF AGREEMENT: See AGREEMENT.

VENDOR AND PURCHASER: See ASSIGNMENT;

BILL OF LADING.

A notice to the vendor of an estate that the vendee has deposited the contract with a third party, *A.*, and has entered into an agreement with *A.* to make to *A.* "a valid assignment" of the contract, does not bind the vendor to make inquiries whether the agreement between the vendee and *A.* has been carried into effect; nor will it compel the vendor to refuse to execute the conveyance to the vendee, who, upon the payment of the purchase-money, demands the conveyance, nor even excuse the vendor for making such a refusal.—The persons who claim to have the benefit of the assignment must give distinct notice to the vendor of their claim, and of their readiness to put themselves in the vendor's position for the completion of the contract.—*F.* entered into a contract with *P.* to sell him some leasehold property. *P.* paid part of the purchase-money, and obtained from *F.* a lease of the premises for a short term of years, in favour of a nominee of *P.* *P.* had dealings with bankers, to whom he became much indebted. Being called on to give the bankers some security, he handed to them the title deeds of a freehold estate, which he charged with the debt, and at the same time he deposited with them his contract for the purchase of the leasehold property. He accompanied this deposit with a written memorandum, in which he agreed to make to the bankers "a valid assignment of my contract with *F.* for the purchase of" the leasehold premises, "by way of mortgage for farther securing," &c. The bankers, by their solicitor, some time afterwards gave to *F.* notice (in the above words) of this agreement, and the solicitor's letter called it "a charge by *P.* on his purchase." *F.* acknowledged the receipt of this notice. He heard nothing more of the matter. *P.* did not complete his purchase at the stipulated time, but did so afterwards, and then *F.*, according to the terms of the original contract, executed to him a conveyance of the leasehold premises, without any notice being taken in the conveyance of the claims of the bankers:—*Held*, that the rule of Equity that a vendor of an estate is, after the making of the contract of sale, a trustee for the purchaser, did not apply to this case, and that *F.* was in no way liable to the bankers. *SHAW v. FOSTER* - - - - - 321

VESTED INTEREST See SUCCESSION DUTY.

WILL.

1. A settlement made by the third Earl of *Harrington* declared the manner in which a mansion-house and certain estates in the county of *Derby* should descend.—A will of the settlor, made many years afterwards, gave personal chattels "in trust for the person or persons who for the time being shall, under the settlement of my mansion-house and estates, be in the actual possession of the same mansion-house and estates, to the end and intent that all and singular such

WILL—*continued.*

[personal chattels] may be deemed and considered as heir-looms, to go along and for ever be used and enjoyed with the same mansion-house and estates (so far as the rules of Law or Equity will permit), but so nevertheless as that the same chattels personal shall not, as to the effect or purpose of transmission, vest absolutely in any person or persons who by virtue of any settlement shall or may become seised of or entitled to the said mansion-house and estates for an estate of inheritance, either in possession or reversion, or otherwise, unless such person shall attain the age of twenty-one years, or dying under that age, shall leave issue inheritable under the limitations in any settlement thereof."—*Held*, that this was not an executory devise.—The testator gave his residuary personal estate to trustees, to convert the same into money, to pay debts, &c., and lay out the surplus in the purchase of real estates to be settled to the same uses as his *Derby* estates under the settlement. The seventh Earl executed a disentailing deed of the estates.—The fourth and fifth Earls of *Harrington* were sons of the settlor and testator. The sixth Earl was his grandson (being the son of the fifth Earl), and he was also the first tenant in tail by descent; he died under twenty-one and without issue; he was succeeded by his cousin, the seventh Earl, who was likewise a grandson of the testator, and had been born between the date of the settlement and that of the will:—*Held*, that the chattels had vested in the sixth Earl, but were divested by his death under twenty-one, and without issue; that the seventh Earl being in actual possession of the estates under the settlement, and being also absolutely entitled to the residuary estate of the third Earl of *Harrington*, had become entitled to the heir-looms and funds bequeathed by the third Earl.—*Per* The Lord Chancellor (Lord *Hatherley*):—The condition in the bequest of the chattels was not annexed by way of proviso cutting down the gift, but was an essential part of it, so that no person could claim the gift except as being the person who could ultimately hold it by fulfilling all the qualifications attached to it.—*Per* Lord *Westbury*:—The death of the infant tenant in tail happened within the period allowed against perpetuities: the direction that the heir-looms should accompany the settled estates remains therefore, *pro tanto*, in full force, and carries them on to the next tenant in tail under the limitations. *HARRINGTON v. HARRINGTON* - - - 87

2. — In construing a will, if the words used are themselves of doubtful meaning, the circumstances of the case may be referred to for the purpose of assisting in the explanation, but must not be employed to shew the construction to be doubtful, in order to enable the Court to make what appears a more reasonable will for the testator.—The rule of construction stated by Lord *Cranworth* in *Abbott v. Middleton* (7 H. L. C. 89) adopted.—The recurring use of the words "As to" at the commencement of several devises is not necessarily an indication of the commencement of a devise complete in itself, and independent, and separate from other limitations.—A testator at the date of his will had two sons and one daughter. The elder son was married, but had no children.

WILL—*continued.*

On the marriage of this son, in 1825, the larger portion of one of the testator's estates (called the *Florida* estate) had been made the subject of settlement. By this settlement the son was (after his father's death) to have a life estate, remainder to his sons by his then intended wife in tail male. In 1836 the testator made a will, which recited this settlement, erroneously describing it as limiting estates in tail male to all the sons of this son. He created certain annuities, and charged them, and also his debts and legacies, on all his estates devised to his two sons, in the proportion of two-thirds and one-third (those being the proportions in which he had devised the estates themselves). He then vested in a trustee the whole of his real estates, by specific description, including his reversion in the settled property. He limited a term of 200 years in all his estates excepting this reversion to secure annuities, debts, and legacies. He then, as to one estate and certain portions of another, limited the uses to his elder son and the sons of that son in tail male and tail general, with remainder to the second son and his sons in tail male and tail general, remainder to the daughters of the two sons successively in tail male. He made similar dispositions as to the smaller portion of his estates in favour of his second son and his sons, giving the remainders to the sons of the elder son, as he had before given them, with respect to the first devised estates, to the sons of the younger son, and then to the daughters of both, as before. He continued: "In default of such issue, male and female, of all the sons and daughters of my sons, then in trust and to the use of my daughter," and concluded with a residuary clause in favour of the sons equally:—*Held*, that this devise over was ambiguous, and might refer to both the estates, or only to one of them, and that, under such circumstances, that construction was to be put upon the will which would best effectuate what appeared to be the reasonable purpose of the testator, and that the devise over must be held to affect both sets of the estates, and not one alone. *GORDON v. GORDON* - - - 254

3. — The phrase in a will "estate tail in possession" does not necessarily mean actual possession, but may be construed as meaning entitled to a vested estate tail in the property, though it may be vested in remainder and the party entitled may not be in actual possession, a previous life estate existing at the time.—*Foley v. Burnell* (1 Bro. C. C. 274; 4 Bro. P. C. 319) adopted.—Where there has been a decree, (all the parties interested being before the Court,) long acquiesced in, which declared a direction for accumulation to be void for remoteness, but also declared that the will was well executed, and that the trusts thereof (except that direction) ought to be carried into effect, the presumption will be that a possible objection to a similar clause in the will had not been overlooked, but had been considered and decided on before the declaration to carry the trusts of the will into execution was made.—The words "provided always" are to be considered as words of reference to all that has gone before them. They constitute a qualification of the preceding limitations.—A testator after giving

WILL—*continued.*

several legacies, directed his trustees to invest dividends, and rents, and profits, and the annual proceeds of his real and personal estates, during the time that any person beneficially interested in those estates should be under twenty-one, in order to accumulate the personal estate.—They were then to hold his real and personal estates for his first grandson, the eldest son of his daughter, then living, for his life, and after his decease for the first and other sons of that grandson in tail, remainder over to the other sons of the daughter.—After other remainders there was an ultimate trust for the testator's right heirs and next of kin according to the nature and tenure of the trust estates respectively. Then followed this proviso:—"I declare it to be my will and meaning, that such person as shall under this my will be entitled to an estate tail in possession in my real estate, shall not be absolutely entitled to my leasehold and personal estates until he, &c., shall attain the age of twenty-one, and that my leasehold and personal estates shall absolutely belong only to such person, &c., as shall first attain the age of twenty-one and become entitled to an estate tail in possession in my real estate under the trusts aforesaid."—The eldest grandson was in possession of the life estate—his eldest son died under twenty-one without issue—but his second son attained that age during his father's lifetime. *MARTILLI v. HOLLOWAY* 532

WINDING-UP—*P. & Co.* were cotton merchants at *Pernambuco*. *A.*, at *Liverpool*, wished to obtain consignments of cotton from them. They desired some security other than his own. He obtained from *Barned's Banking Company*, at *Liverpool*, a letter of credit, by which the bankers authorized the *Pernambuco* firm to draw on them "against cotton purchased in conformity with instructions." The drafts were to be "covered by shipping documents, say invoices and bills of lading of cotton addressed to this company, and forwarded under separate cover by the same mail which brings the drafts for acceptance, on receipt of which documents we engage to honour such drafts." Some shipping documents of cotton were sent, and some bills were accepted—one bill was accepted without any shipping documents being sent—and then, before any one of these bills was due, the bankers became bankrupt, and bills arriving immediately afterwards were left unaccepted. On a winding-up order, issued in the matter of the bank, *J.*, who was the agent of the *Pernambuco* firm, and was also a partner in that firm, claimed to prove against the bankers for the whole amount of the bills, without bringing into account the value of the cotton which had been sold, or which remained in hand:—*Held*, that he was not in a position to do so, but was entitled only to prove for the balance.—The bill-holders had no lien over the goods in the hands of the bankers, so as to enable them to treat the bankers as trustees for their interests. The bankers were only debtors to the bill-holders for the surplus remaining after the goods con-

WINDING-UP—*continued.*

signed had been applied to satisfy the acceptances.—*Waring's Case* (19 Ves. 345; 2 Rose, Bankruptcy Cases, 182) commented on. *BANNER v. JOHNSTON* - - - - - 157

2. — If circumstances occur which by the *Companies Act*, 1862, are such as, in the opinion of the Court, make it "just and equitable" that a company should be wound up, the Court may lawfully issue the order for winding it up. *PRINCESS OF REUSS v. BOS* - - - - - 176

3. — In a winding-up, the funds contributed by the B list of shareholders become part of the general assets of the company, and are not to be applied, preferentially or exclusively, to the payment of those debts which were incurred before the B shareholders retired from the company.—The 38th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), makes the "past members" (persons who have become so by retiring from the company within a year before the date of the winding-up order), liable to contribute to the assets of the company for the payment of the debts and liabilities of the company, but, though they are not specifically liable to satisfy debts which have been contracted since they left the company, yet, when they have become liable to contribute to the assets of the company, and have so contributed, their contributions become part of the general assets, and cannot be appropriated exclusively to the payment of those debts which had been incurred before these members retired from the company.—The word "assets" in the 38th section of this statute means the same as the word "property" in the 133rd section, and both alike mean all the unpaid capital recoverable, as well as the other property of the company.—Observations by Lord Cairns on the duty of the liquidators in making calls on the past members of a company. *WEBB v. WHIFFIN* - - - 711

WORDS—"As to:" *Gordon v. Gordon* - - 254
 — "Assets:" *Webb v. Whiffin* - - 711
 — "Comprised:" *Knox v. Gye* - - 656
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 — "Incumbrancer:" *Grier v. Grier* - - 688
 — "In Possession:" *Martelli v. Holloway* 532
 — "Issue:" *Grier v. Grier* - - 688
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 — "Owner:" *Grier v. Grier* - - 688
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 — "Possession:" *Martelli v. Holloway* - 532
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 — "Reasonable Cause:" *Osgood v. Nelson* 636
 — "Settle:" *Grier v. Grier* - - 688
 — "Successor"—Succession Duty Act: *Attorney-General v. Littledale* - - 290

